

# On Fires, Floods, and Federalism

Andrew Hammond\*

*In the United States, law condemns poor people to their fates in states. Where Americans live continues to dictate whether they can access cash, food, and medical assistance. What's more, immigrants, territorial residents, and tribal members encounter deteriorated corners of the American welfare state. Nonetheless, despite repeated retrenchment efforts, this patchwork of programs has proven remarkably resilient. Yet, the ability of the United States to meet its people's most basic needs now faces an unprecedented challenge: climate change. As extreme weather events like wildfires and hurricanes become more frequent and more intense, these climate-fueled disasters will displace and impoverish more people. How can the United States adapt its welfare programs to assist Americans in the face of this threat?*

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*This Article maps that uncharted territory. It contextualizes the climate crisis in our scholarly understanding of the U.S. welfare state. It then canvasses the myriad disaster provisions in each major welfare program. Equipped with an understanding of the status quo, the Article proceeds to evaluate how federal law has fared amid the recent spate of fires and floods. The Article attends to the role of Congress, weakened as it is by increased polarization and diminished capacity, and how the resulting delays and distortions in emergency relief have hampered the governmental response. The Article then brings state government into focus, and in doing so, demonstrates how assistance often excludes the most vulnerable Americans. The Article also extracts lessons from the pandemic response and applies them to climate adaptation of public benefits. The Article concludes with an agenda for how to adapt welfare programs to meet the climate crisis. That agenda starts and ends with the federal government, but it includes policies states, territories, and Tribes could implement if Congress and federal agencies do nothing or not enough. The Article repurposes what we know about how the U.S. welfare state functions now to inform what government should do next.*

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## INTRODUCTION

In 2017, three Category 4 hurricanes—Harvey, Irma, and Maria—made landfall in the United States in less than a month. Before that, only one such powerful storm had hit the continental United States in a single season. The 2017 storms were among the five most destructive in American history.<sup>1</sup> After Harvey, nearly eight-hundred thousand Texans had to leave their homes because of significant flooding. Before Irma, government officials ordered the evacuation of nearly seven million Floridians. In Maria’s wake, no one in Puerto Rico had electricity for nearly two months, and power outages continued for six more. A few months later, several wildfires ravaged California, five of which were the most destructive in the Golden State’s history. Combined, the 2017 climate-fueled disasters threatened the lives and livelihoods of forty-seven million Americans.<sup>2</sup>

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1. FED. EMERGENCY MGMT. AGENCY, 2017 HURRICANE SEASON FEMA AFTER-ACTION REPORT 1 fig.3 (2018) [hereinafter 2017 AFTER-ACTION REPORT], [https://www.fema.gov/sites/default/files/2020-08/fema\\_hurricane-season-after-action-report\\_2017.pdf](https://www.fema.gov/sites/default/files/2020-08/fema_hurricane-season-after-action-report_2017.pdf) [https://perma.cc/N4EC-S84Y] (listing the damage from the top five most destructive hurricanes: Harvey, Irma, and Maria in 2017, Sandy in 2012, and Katrina in 2005).

2. *Id.*

This kind of consistent, continent-wide devastation of the United States promises to be the new normal.<sup>3</sup> And it will only get worse.<sup>4</sup> The climate crisis demands adaptation.<sup>5</sup> Every corner of our society, and consequently every field of law, will face different challenges from the climate crisis. This Article pursues that adaptation analysis for one area—namely, public benefits.<sup>6</sup> The pressure on all levels of government to meet people’s basic needs in the wake of these disasters is immense. More disaster survivors registered for government assistance in 2017 than in the previous ten years combined.<sup>7</sup> At the end of the 2019 fiscal year, Congress considered the largest annual appropriation for disaster relief for the third year in a row.<sup>8</sup>

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3. See Matthew Cappuci & Jason Samenow, *U.S. Saw Second-Most Billion-Dollar Weather Disasters on Record in 2021*, WASH. POST (Jan. 10, 2022), <https://www.washingtonpost.com/weather/2022/01/10/billion-dollar-disasters-2021/> [<https://perma.cc/63KK-24M4>]; Press Release, Nat’l Aeronautics & Space Admin., 2021 Tied for 6th Warmest Year in Continued Trend, NASA Analysis Shows (Jan. 13, 2022), <https://www.nasa.gov/press-release/2021-tied-for-6th-warmest-year-in-continued-trend-nasa-analysis-shows> [<https://perma.cc/74JQ-YSFS>]; *It’s Official: July Was Earth’s Hottest Month on Record*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. (Aug. 13, 2021), <https://www.noaa.gov/news/its-official-july-2021-was-earths-hottest-month-on-record> [<https://perma.cc/9KRN-TBDK>].

4. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers, in CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS* 5 (2021), [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_SPM.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf) [<https://perma.cc/6X7N-U23Q>] (“Each of the last four decades has been successively warmer than any decade that preceded it since 1850.”). And there is evidence that climate change is causing and exacerbating disasters. See *id.* at 8 (stating that “[e]vidence of observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones, and, in particular, their attribution to human influence, has strengthened since AR5 [the Fifth Assessment Report]”).

5. See *What Do Adaptation to Climate Change and Climate Resilience Mean?*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://unfccc.int/topics/adaptation-and-resilience/the-big-picture/what-do-adaptation-to-climate-change-and-climate-resilience-mean> [<https://perma.cc/7XA9-ASXG>] (defining adaptation as “adjustments in ecological, social, or economic systems in response to actual or expected climatic stimuli and their effects or impacts”).

6. See Robert R.M. Verchick & Abby Hall, *Adapting to Climate Change While Planning for Disaster*, 2011 B.Y.U. L. REV. 2203, 2210 (2011) (identifying public benefits as part of adaptation strategies). Environmental law scholars have debated the meaning and merits of adaptation and mitigation, including whether adaptation undermines mitigation efforts. However, recent work has suggested that the climate crisis will necessarily demand both. See, e.g., Sidney A. Shapiro & Robert R.M. Verchick, *Inequality, Social Resilience and the Green Economy*, 86 UMKC L. REV. 1, 3 (2018); Katherine Trisolini, *Holistic Climate Change Governance: Towards Mitigation and Adaptation Synthesis*, 85 COLO. L. REV. 615, 620–22 (2014); Robin Kundis Craig, “Stationarity is Dead”—*Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENV’T L. REV. 9, 21 (2010); see also David A. Dana, *Climate Change Adaptation as a Problem of Inequality and Possible Legal Reforms*, 117 NW. U. L. REV. 71, 72 (2022) (arguing that “the question of inequality and climate change adaptation within the United States has received little attention, especially from legal scholars”).

7. FED. EMERGENCY MGMT. AGENCY, 2017 AFTER-ACTION REPORT, *supra* note 1, at ii.

8. CONG. RSCH. SERV., *THE DISASTER RELIEF FUND: OVERVIEW AND ISSUES* 18 fig.2 (2022), <https://fas.org/sgp/crs/homesec/R45484.pdf> [<https://perma.cc/ZA7H-CFV2>]; see also WILLIAM L. PAINTER, CONG. RSCH. SERV., *FY2019 DISASTER SUPPLEMENTAL APPROPRIATIONS: OVERVIEW* (2019), [https://www.everycrsreport.com/files/20190730\\_R45844\\_bf64286a1a01398031c3eb548d3f32476e2bea80.pdf](https://www.everycrsreport.com/files/20190730_R45844_bf64286a1a01398031c3eb548d3f32476e2bea80.pdf) [<https://perma.cc/76RR-AT67>] (documenting increases in federal disaster appropriations over the last several years).

Fortunately, societies already have social protection systems in place to help them meet this threat. More than a century ago, national governments began building welfare states—legal systems designed to better protect people against various risks of modern life, including unemployment, old age, and industrial accidents. Over the last hundred years, these welfare states have grown and persisted despite dramatic changes wrought by deindustrialization and globalization.<sup>9</sup> To be sure, welfare states vary significantly across nations, driven in part by differences in political coalitions, social movements, and economic activity.<sup>10</sup> But at a certain level of generality, they collectively represent a core function of government today.<sup>11</sup>

But as welfare states enter a second century, are they ready for the climate crisis? As the environmental changes already underway become even more pronounced, welfare states will face more frequent demands for programs and services. The climate crisis will challenge the ability of public institutions to feed, house, and care for those who are displaced and deprived of necessities. In a sense, climate change and its attendant environmental catastrophes represent a new risk—or at least, a newly potent risk—of modern life.

And is the United States, the wealthiest nation on the planet, ready for this unprecedented challenge? This Article posits that the American welfare state's distinctive characteristics—including its reliance on state-administered and sometimes state-financed services (and the resulting racial hierarchy)—make it particularly ill-suited to meet the climate crisis. Indeed, recent events show the ways in which the United States struggles to provide basic assistance to people after climate-fueled disasters. Following wildfires and hurricanes in 2017, both California and Texas struggled to immediately implement disaster food assistance, shutting down access in some counties before starting it up in others.<sup>12</sup> Often federal, state, and local governments cannot rely on public infrastructure, like schools or parks, to deliver benefits in person. In Oregon, the air quality at schools was so toxic that the state needed a federal waiver to deliver sealed meals to children at their homes.<sup>13</sup> After Hurricane Irma, fifty thousand

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9. See *infra* Part I.A.

10. See generally GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990).

11. See, e.g., David Garland, *The Welfare State: A Fundamental Dimension of Modern Government*, 55 EUR. J. SOCIO. 327, 356 (2014) (arguing that “the welfare state is not a policy option that we are free to adopt or reject at will” but rather “a fundamental dimension of modern society, absolutely integral to the economic functioning and social health of industrialized capitalist societies”).

12. See *infra* Part III.B.1.

13. See Press Release, Food & Nutrition Serv., USDA Provides Oregon Children Impacted by Wildfires More Flexible Access to Meals Service (Sept. 7, 2017) [hereinafter FNS Press Release], <https://www.usda.gov/media/press-releases/2017/09/08/usda-provides-oregon-children-impacted-wildfires-more-flexible> [https://perma.cc/46FM-KNVN].

Floridians lined up at a park in Miami on a single day for food assistance.<sup>14</sup> At another food site in Florida, so many people in line collapsed from heat exhaustion that police had to shut it down.<sup>15</sup>

By requiring that people apply for assistance in person, federal and state law discriminates against those who cannot stand in line for hours, like senior citizens, children, and people with disabilities—not to mention the people who care for them. That’s why New Yorkers with disabilities sued their city and state governments under the Americans with Disabilities Act.<sup>16</sup> Yet, the Federal Emergency Management Agency (FEMA) maintains that it cannot be sued under the Administrative Procedure Act for any discretionary benefit it provides Americans after a disaster.<sup>17</sup> Courts routinely accept the federal agency’s defense.<sup>18</sup> Even if FEMA could be sued, people would find it difficult to secure adequate representation. While federal law permits disaster legal services, those services are provided exclusively through volunteers from the American Bar Association’s (ABA) Young Lawyers Division.<sup>19</sup> And states routinely refuse to permit out-of-state lawyers to provide representation to disaster survivors.<sup>20</sup>

14. Glenn Garvin, *50,000 Line Up Outside Tropical Park Seeking Post-Hurricane Food Assistance*, MIA. HERALD (Oct. 15, 2017), <https://infoweb.newsbank.com/apps/news/document-view?p=NewsBank&docref=news/1678ED9441C02690> [https://perma.cc/9BGB-YHBS].

15. Monique Madan, *Food Assistance Centers Close After People Suffer Heat Exhaustion in Line*, MIA. HERALD (Oct. 14, 2017), <https://infoweb.newsbank.com/apps/news/document-view?p=NewsBank&docref=news/1678D8E5C3957EE8> [https://perma.cc/8FB6-YRBM].

16. See Complaint ¶¶ 1–2, *Toney-Dick v. Doar*, No. 12-cv-9162, 2012 WL 6555431 (S.D.N.Y. Nov. 14, 2013) (alleging violations of the Americans with Disabilities Act, the Rehabilitation Act, the Food and Nutrition Act, and state and local law).

17. See, e.g., *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 289–91 (5th Cir. 2012) (affirming the district court’s dismissal of Federal Tort Claims Act (FTCA) claims); *Ridgely v. FEMA*, 512 F.3d 727, 739–41 (5th Cir. 2008) (vacating the district court’s grant of a preliminary injunction on the grounds that plaintiffs did not have a protectable property interest because FEMA had discretion in distributing benefits); *Santos v. FEMA*, 327 F. Supp. 3d 328, 339–45 (D. Mass. 2018) (dismissing Administrative Procedure Act claims on similar grounds); *McWaters v. FEMA*, 436 F. Supp. 2d 802, 825–28 (E.D. La. 2006) (same). *But see* Ass’n of Cmty. Orgs. for Reform Now v. FEMA, 463 F. Supp. 2d 26, 34 (D.D.C. 2006) (holding that the evacuees had “a protectable property right in the housing assistance administered by FEMA, which cannot be deprived without due process of law”). See generally John K. Pierre & Gail S. Stephenson, *After Katrina: A Critical Look at FEMA’s Failure to Provide Housing for Victims of Natural Disasters*, 68 LA. L. REV. 443, 478–82 (2008) (discussing challenges of suing FEMA).

18. See Pierre & Stephenson, *supra* note 17, at 478–82.

19. See 42 U.S.C. § 5182; 44 C.F.R. § 206.164 (mandating that these legal services “shall be provided free,” but that “[f]ee-generating cases shall not be accepted by lawyers operating under these regulations”); Memorandum of Understanding Between the Fed. Emergency Mgmt. Agency and the Am. Bar Ass’n Regarding Disaster Legal Services 4 (May 9, 2012) [hereinafter FEMA-ABA MOU], [https://www.disasterlegalaid.org/library/item.455414-MOU\\_between\\_ABA\\_YLD\\_and\\_FEMA\\_May\\_2012](https://www.disasterlegalaid.org/library/item.455414-MOU_between_ABA_YLD_and_FEMA_May_2012) [https://perma.cc/5VP2-VB4Y]; see also FED. EMERGENCY MGMT. AGENCY, DISASTER LEGAL SERVICES FACT SHEET 1 (2019) [hereinafter DISASTER LEGAL SERVICES], <https://www.mass.gov/doc/disaster-legal-services/download> [https://perma.cc/TDN8-JUM8] (discussing limitations on legal practice).

20. See MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 14 (Am. Bar Ass’n 2019); RULES OF THE CT. OF APPEALS FOR THE ADMISSION OF ATT’YS & COUNS. AT L. § 520.11(d) (N.Y.) (laying out procedure for the “Provision of Legal Services Following Determination of Major Disaster”); *In re*

Meanwhile, Congress fails to reliably appropriate disaster relief. Following the devastating disasters across the country in 2017, Congress dithered in enacting additional appropriations.<sup>21</sup> In the end, Iowa waited two months, California waited a few more months, Florida waited nearly eight months, and Puerto Rico waited over a year before Congress finally passed the disaster relief bill.<sup>22</sup> This kind of governmental failure in the face of country-wide devastation is a grim vision of American governance in the coming decades. Unless we

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Amendments to the Rules Regulating the Florida Bar (Biannual Report), 101 So. 3d 807, 808 (Fla. 2012) (per curiam) (declining to adopt a rule that would “would allow lawyers from other jurisdictions to practice in Florida on a limited basis following a natural disaster”); Carolina Bolado & Natalie Rodriguez, “*Now Is The Real Crisis*”: Puerto Ricans Struggle for Disaster Aid, LAW360 (Feb. 10, 2019), <https://www.law360.com/articles/1123340> [<https://perma.cc/9DEL-AWUX>] (describing concerns among Puerto Rican lawyers that the civil law provenance of that territory’s law would be particularly challenging for other lawyers); Order, Misc. Docket No. 21-9027, Emergency Order After Winter Storm Uri Permitting Out-of-State Lawyers to Practice Texas Law Temporarily (Tex. Mar. 5, 2021) [hereinafter Emergency Order After Winter Storm Uri]; Order, Misc. Dkt. No. 17-9101, Amended Emergency Order After Hurricane Harvey Permitting Out-of-State Lawyers to Practice Texas Law Temporarily (Tex. Aug. 30, 2017) [hereinafter Emergency Order After Hurricane Harvey].

21. See, e.g., DOTTIE ROSENBAUM, CTR. ON BUDGET & POL’Y PRIORITIES, USDA TO FUND SNAP FOR FEBRUARY 2019, BUT MILLIONS FACE CUTS IF SHUTDOWN CONTINUES (Jan. 10, 2019) (describing the stalling of the Senate majority in voting on an appropriations bill passed by the House); Mihir Zaveri, Guilbert Gates & Karen Zraick, *The Government Shutdown Was the Longest Ever. Here’s the History.*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/interactive/2019/01/09/us/politics/longest-government-shutdown.html> [<https://perma.cc/8Y5D-873P>]; Emily Cochrane & Glenn Thrush, *Disaster Relief Usually Sails Through Congress. The Sticking Point Now: Puerto Rico*, N.Y. TIMES (Apr. 11, 2019), <https://www.nytimes.com/2019/04/11/us/politics/disaster-relief-puerto-rico.html> [<https://perma.cc/99QH-C4HQ>]; Marianne Levine, *Disaster Aid Stalls in Senate, As Trump Revs Up Attack on Puerto Rico*, POLITICO (Apr. 2, 2019), <https://www.politico.com/story/2019/04/02/senate-democrats-disaster-relief-amendment-1249169> [<https://perma.cc/3UWG-XX2J>]; Press Release, Off. of Sen. Marco Rubio, After Unnecessary Delay, House Finally Passes Disaster Bill (June 3, 2019) [Sen. Marco Rubio Press Release], <https://www.rubio.senate.gov/public/index.cfm/2019/6/after-unnecessary-delay-house-finally-passes-disaster-bill> [<https://perma.cc/A5YB-MZA8>]; Li Zhou, *Congress Finally Passes \$19 Billion in Disaster Aid*, VOX (June 3, 2019), <https://www.vox.com/policy-and-politics/2019/6/3/18647872/congress-disaster-aid-puerto-rico-donald-trump> [<https://perma.cc/U689-FPCT>]; Leigh Ann Caldwell & Frank Thorp V, *Republicans Signal New Willingness to Pass Disaster Aid Bill*, NBC NEWS (May 7, 2019), <https://www.nbcnews.com/politics/congress/republicans-signal-new-willingness-pass-disaster-aid-bill-n1003046> [<https://perma.cc/NC3W-CJQ9>]; David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1442–44 (2011) (discussing how the surge in need overwhelmed state and local bureaucracies tasked with distributing assistance during Hurricane Katrina); Press Release, Tex. Health & Hum. Servs. Comm’n, Texas Expands D-SNAP to Three More Counties (Sept. 25, 2017), <https://co.jefferson.tx.us/documents/harvey%20docs/D-SNAP%20NEWS%20RELEASE.pdf> [<https://perma.cc/D9Q7-7ESL>]; SNAP Monthly Participation Increases Due to Hurricane Harvey in September 2017; Continues Over-the-Year Decline Trend, FOOD RSCH. & ACTION CTR. (Sept. 2017) [hereinafter *SNAP Monthly Participation Increases*], <https://frac.org/research/resource-library/snap-monthly-data-2017> [<https://perma.cc/J9FX-NT44>] (“In Texas, SNAP participation increased in September 2017 by 809,109 persons, as Hurricane Harvey hit Houston and other areas hard.”); Christopher Collins, *Still No Deal Between State and Feds on Disaster Food Aid for Harvey Victims*, TEX. OBSERVER (Sept. 6, 2017), <https://www.texasobserver.org/still-no-deal-between-state-and-feds-on-disaster-food-aid-for-harvey-victims/> [<https://perma.cc/7VRS-M42Q>] (“It’s unknown why Texas hasn’t launched the emergency program yet.”).

22. See sources cited *supra* note 21.

retrofit federal and state law now, more and more Americans who survive wildfires and hurricanes will go without food, shelter, and medical care.

With that sense of urgency, this Article makes three contributions. To begin, the Article analyzes how federal, state, and local governments currently administer public benefits following climate-fueled disasters. Legal scholars who focus on poverty and inequality have paid insufficient attention to how public benefits programs drive disaster responses.<sup>23</sup> The Article also draws lawmaking lessons from recent examples, including but not limited to the fires in California and the storms in Florida, New York, Puerto Rico, and Texas. The Article attends to the litigation, legislation, and regulation that followed. The Article explores how these government efforts are shaped by and could further exacerbate the tiers of social citizenship that define the modern welfare state, including the exclusion of Indigenous and territorial Americans.

Second, the Article incorporates lessons from the strengths and weaknesses of the U.S. safety net's response to the COVID-19 pandemic. It lays out how Congress and state governments used existing welfare programs and created new ones in their responses to the pandemic. Specifically, the Article shows how Congress relied on and augmented longstanding programs like Medicaid, the Supplemental Nutrition Assistance Program (SNAP), and unemployment insurance (UI) to help Americans make ends meet during a national emergency. The COVID-19 pandemic, while deadly and destabilizing in ways few could have imagined, provoked our national government into providing unprecedented financial assistance in the first year of the pandemic. Marrying an analysis of the pandemic response with lessons learned from recent climate-fueled disasters points the way forward for further statutory fixes. The pandemic response illustrates how Congress, federal agencies, and state governments possess significant power to ameliorate suffering and hardship.

Third, the Article concludes with recommendations on how to restructure public benefit programs to meet this daunting, planetary phenomenon. Here's a preview of the climate adaptation agenda for welfare programs laid out in detail below. First, poor people's access to these programs should not depend on the vagaries of politics on Capitol Hill or in state houses. Instead, policymakers should decide *ex ante* who should receive what benefits when a climate-fueled disaster strikes. Second, these programs should be accessible to all people in need, not just people who can stand in line for eight hours. Finally, these benefits should not evaporate at a state's borders but travel with the people in need. This Article identifies how federal and state law should change along these lines of reliability, accessibility, and portability. In doing so, the Article presses the claim

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23. A notable exception is MICHELE LANDIS DAUBER, *THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE* (2013). Dauber's book charts how disaster relief helped create the New Deal welfare state, but its account is necessarily confined to the late nineteenth and early twentieth centuries.



that our welfare state's current system of cooperative federalism cannot rise to the challenge of the climate crisis.

One opening caveat: this Article confines its analysis to the means-tested programs that dominate the discourse of the American welfare state.<sup>24</sup> These programs also reach the most people. Following the changes in traditional cash assistance and the 1996 welfare reform legislation, the last twenty-five years have seen significant increases in expenditures in the major means-tested public benefits.<sup>25</sup> For different reasons, the Earned Income Tax Credit (EITC),<sup>26</sup> Medicaid,<sup>27</sup> SNAP,<sup>28</sup> and Supplemental Security Income (SSI)<sup>29</sup> have grown steadily. While not for lack of trying, the Trump administration and the 115th Congress were unable to make any long-lasting cuts, via legislation or regulation, to any of these programs.<sup>30</sup> This Article also discusses other programs whose funding and reach have deteriorated over time, such as UI, as well as programs administered by FEMA.<sup>31</sup>

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24. Means-tested programs refers to those public benefits in which eligibility is based primarily on need, in contrast to Social Security Old-Age Insurance and Medicare, access to which turns primarily on past contributions. *See, e.g.*, CONG. BUDGET OFF., FEDERAL MANDATORY SPENDING FOR MEANS-TESTED PROGRAMS, 2009 TO 2029 1 (2019), <https://www.cbo.gov/system/files/2019-06/55347-MeansTested.pdf> [<https://perma.cc/6AVH-K5HR>] (defining means-tested programs as those that “provide cash payments or other forms of assistance to people with relatively low income or few assets”).

25. *Id.* at 2–3.

26. *See* Monica Prasad, *American Exceptionalism and the Welfare State: The Revisionist Literature*, 19 ANN. REV. POL. SCI. 187, 201 (2016) (summarizing the scholarship on the EITC as demonstrating “how the American welfare state has been surprisingly resilient in the era of neoliberalism”).

27. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 627 (2012) (Ginsburg, J., concurring and dissenting in part) (“Expansion has been characteristic of the Medicaid program.”).

28. *See* David A. Super, *The Quiet “Welfare” Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1285–86 (2004) (detailing how “anti-hunger advocates” responded to the demands of welfare reform in the 1990s and managed to “save[] what in many respects is the best-designed means-tested program in the United States.”).

29. *See* Robert A. Moffitt, *The Deserving Poor, the Family, and the U.S. Welfare System*, 52 DEMOGRAPHY 729, 730 (2015) (arguing that U.S. social welfare spending grew from 1970 to 2006 with relatively more support for people with disabilities).

30. *See* Rules Regarding the Frequency and Notice of Continuing Disability Reviews; Withdrawal, 86 Fed. Reg. 40387 (July 28, 2021) (withdrawing proposed change to additional reviews of SSI recipients); CONG. RSCH. SERV., THE EARNED INCOME TAX CREDIT (EITC): A BRIEF LEGISLATIVE HISTORY 12 (2022), <https://sgp.fas.org/crs/misc/R44825.pdf> [<https://perma.cc/CSJ2-D9NV>] (discussing limited changes to EITC); Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 NW. U. L. REV. 361, 401–26 (2020) [hereinafter *Litigating Welfare Rights*] (analyzing the failed efforts to cut SNAP and Medicaid between 2017 and 2020).

31. These programmatic confines have shaped past work. *See* Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639 (2021) (analyzing the ways in which Americans in the five territories are left out of the typical arrangements for Medicaid, SNAP, and SSI); Hammond, *Litigating Welfare Rights*, *supra* note 30 (discussing legal implications of the federalism structure of Medicaid and SNAP); Andrew Hammond, *The Immigration-Welfare Nexus in a New Era?*, 22 LEWIS & CLARK L. REV. 501, 509 (2018) (detailing how federal and state law excludes many immigrants and their families from Medicaid, SNAP, and SSI); Andrew Hammond, Ariel Jurow Kleiman & Gabriel Scheffler, *How the COVID-19 Pandemic Has and Should Reshape the American*

The animating idea for this Article can be summed up in four statements. First, public benefits in the United States are an integral part of how federal, state, territorial, tribal, and local governments respond to extreme weather events. Second, climate-fueled disasters have and will become more frequent and more devastating. Third, as a result, the peculiarities and pathologies of the American welfare state, including its attendant racial hierarchy, will undermine our government's ability to respond to the ravages of the climate crisis. Fourth, there are statutory and regulatory changes that would make public benefits more reliable, accessible, and portable.

Accordingly, the Article proceeds as follows. Part I situates U.S. anti-poverty programs in the climate crisis. Part II explains how federal, state, territorial, and tribal governments use welfare programs to respond to extreme weather events. To do so, the Article dives into the thicket of federal statutes, regulations, and sub-regulatory guidance that govern these programs. Part III then details the weaknesses in the status quo, paying particular attention to the role of Congress as well as to the last decade of recovery efforts. That Part concludes with a survey of the pandemic-induced social welfare legislation and regulation in the hope that the government's response to that public health and economic emergency provides lessons for the climate crisis. Part IV launches an agenda for how government should adapt U.S. welfare programs for the rapidly changing climate, identifying possible avenues for federal, state, and local governments.

## I.

### THE WELFARE STATE AND THE CLIMATE CRISIS IN THE UNITED STATES

Before we understand how the welfare state in the United States will have to adapt to meet the climate crisis, we must first understand what that welfare state is. This Part provides a brief sketch of the U.S. welfare state's persistent pathologies. In a sense, the climate crisis is a new risk of modern life—or at least

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*Safety Net*, 105 MINN. L. REV. HEADNOTES 154 (2020) (discussing how pandemic-related assistance through existing transfer programs perpetuates exclusions of those who are normally excluded from safety net programs). To sweep in more programs, such as the National Flood Insurance Program, would overwhelm the Article. Others will bring their insights to bear on the challenges of thinking through how to adapt other legal regimes and institutions, including ones that bear directly on the well-being of poor people, in the face of a rapidly warming planet. For instance, the National Flood Insurance Program subsidizes construction in flood-prone areas. See, e.g., Christine A. Klein, *The National Flood Insurance Program at Fifty: How the Fifth Amendment Takings Doctrine Skews Federal Flood Policy*, 31 GEO. ENV'T L. REV. 285 (2019). The U.S. Department of Housing and Urban Development sells foreclosed properties in those areas. See Huo Jingnan, Rebecca Hersher, Tegan Wendland, Steve Newborn & Daniel Rivero, *The Federal Government Sells Flood-Prone Homes to Often Unsuspecting Buyers*, NPR (Sept. 13, 2021), <https://www.npr.org/2021/09/13/1033993846/the-federal-government-sells-flood-prone-homes-to-often-unsuspecting-buyers-npr-> [<https://perma.cc/FL8G-XVM6>]. And the U.S. Department of Agriculture subsidizes farmers in ways that increase the emission of greenhouse gases like methane. See, e.g., Trevor J. Smith, *Corn, Cows, and Climate Change: How Federal Agricultural Subsidies Enable Factory Farming and Exacerbate U.S. Greenhouse Gas Emissions*, 9 WASH. J. ENV'T L. & POL'Y 26 (2019).

one that will become more frequent and more intense. Welfare programs have always been part of American disaster response—just in ways that escape traditional narratives of the welfare state.

#### A. *The American Welfare State Today*

The United States permits much higher levels of poverty than other wealthy democracies do. Of the thirty-seven member nations in the Organisation for Economic Co-operation and Development (OECD), the United States has one of the highest relative poverty rates for people of working age and the fifth-highest child poverty rate.<sup>32</sup> Even though the United States has a lower relative poverty rate among its elderly population, it still is higher than those of thirty-two OECD countries.<sup>33</sup> Considering these high levels of poverty amid unprecedented affluence, social scientists often label the United States as a prototypically residual welfare state.<sup>34</sup> These scholars point out that more so than other wealthy democracies, the United States relies on market forces, including employment-based schemes of private health care and social insurance, and only provides minimal government assistance when the private sector and family resources fail.<sup>35</sup> In that sense, the United States appears to have a weaker welfare state. In another, the U.S. welfare state is not always less generous than those of other nations. It's just different. A closer look at the U.S. welfare state suggests that characterizing the United States as a residual welfare state risks obscuring some of its key features.<sup>36</sup>

First, this revisionist line of research shows how anti-government politics and concealed mechanisms of delivery obscure the character and reach of American social welfare policy—relying as it does on tax-subsidized, employer-provided benefits.<sup>37</sup> Yet, in terms of expenditures, net social spending in the United States as a percentage of gross domestic product (GDP) outstrips that of

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32. *OECD Data: Poverty Rate, 0–17 Year-Olds, 18–65 Year-Olds, Ratio, 2019*, ORG. FOR ECON. COOP. & DEV., <https://data.oecd.org/inequality/poverty-rate.htm> [<https://perma.cc/E9U2-TJ6G>].

33. *OECD Data: Poverty Rate, 66 Year-Olds or More, 2019*, ORG. FOR ECON. COOP. & DEV., <https://data.oecd.org/inequality/poverty-rate.htm> [<https://perma.cc/K9TB-3KNE>].

34. See ESPING-ANDERSEN, *supra* note 10, at 33; see also Wil Arts & John Gelissen, *Three Worlds of Welfare Capitalism or More? A State-of-the-Art Report*, J. EUR. SOC. POL'Y 137, 143 tbl.1 (2002) (updating Esping-Andersen's study).

35. See, e.g., Chloe Thurston, *Racial Inequality, Market Inequality, and the American Political Economy*, in THE AMERICAN POLITICAL ECONOMY: POLITICS, MARKETS, AND POWER, 133, 133–57 (Jacob S. Hacker, Alexander Hertel-Fernandez, Paul Pierson & Kathleen Thelen eds., 2021).

36. See Prasad, *supra* note 26, at 201.

37. See, e.g., SUZANNE METTLER, THE SUBMERGED STATE 4–7 (2011); MARIE GOTTSCHALK, THE SHADOW WELFARE STATE: LABOR, BUSINESS, AND THE POLITICS OF HEALTH CARE IN THE UNITED STATES 16 (2000); see also Jacob S. Hacker, *America's Welfare Parastate*, PERSPS. ON POL. 777, 777 (2016) (describing how this work, by emphasizing “what government actually does,” demonstrates “a system of social provision that is much bigger, messier, less equalizing, and less reflective of the preferences of the political left than prior scholarship indicated”).

Germany, Sweden, and the United Kingdom.<sup>38</sup> By tying social provision to employment, though, the United States has ensured that its social spending is less progressive as a result. The U.S. welfare state, while larger than previously thought, is comparatively less generous for those who are too young or too sick to work, not to mention those who care for them.

Second, the United States channels assistance to poor people in exceptional ways. The federal government relies heavily on its tax system to distribute transfers not just to upper- and middle-class professionals, but to poor people, especially through the EITC and the Child Tax Credit (CTC).<sup>39</sup> Moreover, the United States runs SNAP, one of its largest anti-poverty programs, through the U.S. Department of Agriculture.

Third, aside from the EITC, CTC, and SNAP, programs for low-income households exhibit significant variation across the fifty states, the District of Columbia, the five territories, and Tribes. Federal law provides flexibility to states in structuring and administering public benefits. Some states use that flexibility to get closer to universal health insurance.<sup>40</sup> Others have repurposed federal funds intended for one program or population for another.<sup>41</sup> Consequently, there are states like Massachusetts where only one in thirty residents lack health insurance, and then there are states like Texas where one in five go without.<sup>42</sup> Thirty-three states, the District of Columbia, Puerto Rico, and Guam have their own EITCs for low-income residents,<sup>43</sup> and California is moving incrementally to a state-funded guaranteed income.<sup>44</sup> Therefore, in many respects, the United States does not have one welfare state; it has more than fifty.

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38. See Hacker, *supra* note 37, at 778 (“Let that sink in: A larger share of the American economy is spent on social benefits than the comparable share of the Swedish economy.”).

39. See, e.g., Ariel Jurow Kleiman, *Impoverishment by Taxation*, 170 U. PA. L. REV. 1451, 1462 (2022); Susannah Tahk, *The Tax War on Poverty*, 56 ARIZ. L. REV. 791, 794–95 (2014); Sara Sternberg Greene, *The Broken Safety Net: A Study on Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515, 530–32 (2013).

40. See Pakinam Amer, *How Massachusetts Became a National Leader on Health Care—And How It Can Lead Again*, BOS. GLOBE 2 (Jan. 28, 2020), <https://www.bostonglobe.com/2020/01/28/opinion/how-massachusetts-became-national-leader-healthcare-how-it-can-lead-again> [<https://perma.cc/BGA3-977B>] (describing the state’s efforts, including before the Affordable Care Act, to cover all residents).

41. See DANIEL L. HATCHER, *THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICA’S MOST VULNERABLE CITIZENS* 1–3 (2016) (offering case studies of states using funding for foster care, Medicaid, and child support for other purposes).

42. KATHERINE KEISLER-STARKEY & LISA N. BUNCH, U.S. CENSUS BUREAU, *HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2019–20* tbl.A-3 (2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-271.pdf> [<https://perma.cc/KTZ5-X7Z4>].

43. *Earned Income Tax Credit Overview*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 27, 2023), <https://www.ncsl.org/human-services/earned-income-tax-credit-overview> [<https://perma.cc/7MYR-F4VM>].

44. Adam Beam, *California Approves 1st State-Funded Guaranteed Income Plan*, AP NEWS (July 15, 2021), <https://apnews.com/article/government-and-politics-california-4fea151e0425f8188337e44a02ab8177> [<https://perma.cc/KZ9P-L9N6>].

Still, that variation has a ceiling. No state in the United States has a safety net for poor people that approaches Canada's or the U.K.'s, let alone one of the Nordic countries. Every state save Vermont must balance its budget, and countercyclical programs and balanced budget requirements do not mix.<sup>45</sup> Precisely when a state faces plummeting revenue, it experiences a surge in need. Therefore, it is unlikely that any state in the union could create a social democratic infrastructure without significant and sustained federal investment. Moreover, the cooperative federalism built into these programs permits the exclusion of various groups—immigrants, tribal members, and territorial Americans—from basic assistance. For decades and to this day, Indigenous Americans, childless adults, immigrant Americans, Americans in the territories, and Americans in the South and predominantly rural states experience a markedly different level of social protection.

### B. Poverty and Migration in the United States

The United States has been shaped by centuries-long displacement, enslavement, and migration of peoples. Yet, as a formal matter, its constitutional system maintains that all Americans are free to move about the country. Nonetheless, federal, state, and local governments have repeatedly sought to limit and punish the movement of poor Americans, whether they are immigrants from another country or migrants from another state. Some Americans are more likely to move because of their poverty, and some are more likely to be stuck because of the same.<sup>46</sup> This historical, doctrinal, and demographic backdrop serves as necessary context for any discussion of what the climate crisis will mean for poverty and internal displacement in the United States. This Section ties these disparate strands together.

Since the early eighteenth century, state and local governments routinely barred or expelled poor people.<sup>47</sup> And governments at all levels in the United States asserted authority to displace, conquer, and confine Indigenous peoples and permit others to enslave millions of people, predominantly from the African continent. In the late nineteenth and early twentieth centuries, state and local governments tried to block and expel poor people. In particular, this kind of state and local action focused on three movements of people *en masse*: the highest

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45. See David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2554 (2005) (lamenting that traditional theories of federalism “routinely fail to appreciate the gravity of the constraints in states’ fiscal constitutions” and then detailing those constraints).

46. See Sara Sternberg Greene, *A Theory of Poverty: Legal Immobility*, 96 WASH. U. L. REV. 753, 759–67 (2019).

47. *Shapiro v. Thompson*, 394 U.S. 618, 629 n.7 (1969) (discussing the 1601 Elizabethan Poor Law and the 1662 English Law of Settlement and Removal served as “models adopted by the American Colonies”). See generally SAMANTHA SEELEY, *RACE, REMOVAL, AND THE RIGHT TO REMAIN: MIGRATION AND THE MAKING OF THE UNITED STATES* (2021); HIDETAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES & THE 19TH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* (2017).

rates of immigrating people in the country's history beginning in the late nineteenth century and continuing into the twentieth;<sup>48</sup> Black people throughout the South fleeing Jim Crow beginning in the early 1900s;<sup>49</sup> and people in Arkansas, Oklahoma, and Texas fleeing the Dust Bowl in the 1930s.<sup>50</sup>

Courts responded to these state and local practices in a fitful manner. When it came to state and local discrimination against immigrants, the Supreme Court did interpret the Equal Protection Clause as applying to non-citizens.<sup>51</sup> When it came to state and local practices to segregate and deny Black Americans access to housing and other basic services, courts permitted them, as they had permitted different but similarly racist practices in the South.<sup>52</sup> But in *Edwards v. California*, the Supreme Court struck down California's "settlement law" that made it a misdemeanor to help a poor person enter the state, motivated by an attempt to control and deter migrants from the Dust Bowl.<sup>53</sup>

Legal aid attorneys relying on *Edwards* and the changing jurisprudence on vagrancy began challenging welfare rules that excluded new residents.<sup>54</sup> In *Shapiro v. Thompson*, the Supreme Court considered statutory provisions imposing a one-year wait period before new residents to the state could receive Aid to Families with Dependent Children (AFDC), an earlier federal cash

48. See Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/> [<https://perma.cc/ZY2L-9299>] (concluding that "today's immigrant share remains below the record 14.8% share in 1890, when 9.2 million immigrants lived in the U.S."); *U.S. Immigrant Population and Share over Time, 1850–Present*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-over-time> [<https://perma.cc/94HN-3YQJ>] (showing historically high shares of immigrant population between 1850 and 1930); see also JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925* (2002) (discussing this historic wave of immigration).

49. See ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS* 10 (2010) (noting that before the Great Migration began, only 10 percent of Black Americans lived outside the South, but by the 1970s, nearly half did).

50. See Vellore Arthi, "*The Dust Was Long in Settling*": *Human Capital and the Lasting Impact of the American Dust Bowl*, 78 J. ECON. HIST. 196, 196–200 (2018); Robert A. McLeman, Juliette Dupre, Lea Berrang Ford, James Ford, Konrad Gajewski & Gregory Marchildon, *What We Learned from the Dust Bowl: Lessons in Science, Policy, and Adaptation*, 35 POPULATION & ENV'T 417, 418–20 (2013); Richard Hornbeck, *The Enduring Impact of the American Dust Bowl: Short- and Long-Run Adjustments to Environmental Catastrophe*, 102 AM. ECON. REV. 1477, 1494–96 (2012). See generally WALTER J. STEIN, *CALIFORNIA AND THE DUST BOWL MIGRATION* (1973).

51. See *Yick Wo v. Hopkins*, 118 U.S. 355, 368–69 (1886).

52. See *Plessy v. Ferguson*, 163 U.S. 537, 538–39, 552 (1896). See generally LAWRENCE GOLDSTONE, *INHERENTLY UNEQUAL: THE BETRAYAL OF EQUAL RIGHTS BY THE SUPREME COURT, 1865–1903* (2011) (discussing the Court's race jurisprudence during this period); WILLIAM COHEN, *AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL 1861–1915* (1991) (discussing government efforts in the South to subjugate Black Americans).

53. 314 U.S. 160, 181 (1941); see also Clare Pastore, *When Paupers Became People: Edwards v. California (1941)*, in *THE POVERTY LAW CANON: EXPLORING THE MAJOR CASES* 15, 16 (Marie A. Failing & Ezra Rosser eds., 2016); *id.* at 13, 23–28 (discussing the common law traditions of expelling and excluding poor people and that doctrine's implications for *Edwards*).

54. See RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* 178–80 (2016).

assistance program. The Court reasoned that imposing a waiting period on welfare benefits violated a poor American's fundamental right to travel.<sup>55</sup> Five years later, the Court struck down Arizona's durational residence requirement for free medical care because it "penalize[d] indigents for exercising their right to migrate to and settle in that State."<sup>56</sup> There, the Supreme Court elaborated that "the right of interstate travel must be seen as insuring new residents the same right to vital government[al] benefits and privileges in the States to which they migrate as are enjoyed by other residents."<sup>57</sup> In subsequent cases, the Court made it clear that "[c]itizens of the United States, whether rich or poor, have the right to choose" their place of residence without jeopardizing their eligibility for welfare assistance.<sup>58</sup> If Americans cannot "seek[] new horizons in other States," the Constitution would "withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity."<sup>59</sup> As Justice Jackson put it in his concurrence in *Edwards*, "[i]f national citizenship means less than this, it means nothing."<sup>60</sup>

As a matter of history, the United States has seen dramatic migration into and within the country. As a matter of doctrine, the Supreme Court has, if fitfully, been called on to protect the freedom of people to migrate. But neither history nor doctrine dictate destiny. The United States' history of xenophobic and racist policies to exclude and punish newly arrived residents should chasten us to make any rosy predictions about this country's ability to respond to increased need and displacement due to the climate crisis. As the next Section shows, poor people as well as the elderly, people with disabilities, and children will be particularly vulnerable to the ravages of climate change.

### C. Poverty in the United States and the Climate Crisis

Poor people live in parts of the United States that are susceptible to climate-fueled disasters. A disproportionate number of poor Americans live only slightly above sea level.<sup>61</sup> Poorer rural areas from the South to the West are particularly

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55. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *see also Saenz v. Roe*, 526 U.S. 489, 500 (1999) ("The 'right to travel' discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."); KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972* 264 (2016) ("*Shapiro* signaled that poor people were citizens of the nation, first and foremost, and that their rights as national citizens could trump the longstanding prerogatives of state and local governments.").

56. *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 261–62 (1974) (citing *Shapiro*, 394 U.S. at 634).

57. *Id.* at 261.

58. *Saenz*, 526 U.S. at 510 (1999).

59. *Edwards v. California*, 314 U.S. 160, 181 (1941) (Douglas, J., concurring).

60. *Id.* at 183 (Jackson, J., concurring).

61. *See* Jonathan Lovvorn, *Climate Change Beyond Environmentalism Part I: Intersectional Threats and the Case for Collective Action*, 29 GEO. ENV'T L. REV. 1, 20 (2016) (identifying the

exposed to wildfires.<sup>62</sup> While wealthy people also live in areas that are vulnerable to these catastrophes, poor people have fewer resources to modify and retrofit their homes and communities to withstand climate change, as well as fewer resources to relocate temporarily or permanently.<sup>63</sup> Poor people will lack the funds to sufficiently cool their homes in extreme heat, move out of floodplains, and evacuate in time before storms.<sup>64</sup> Furthermore, poor people are more likely to rely on public infrastructure like working roads to live and earn a living.<sup>65</sup> Moreover, climate change will impoverish more people in the United States—destroying livelihoods, wiping out assets, and creating massive surges in need. In a study of disasters in the United States from 1920 to 2010, county-level poverty rates increased as people who could afford to leave the area did.<sup>66</sup> These interlocking relationships between poverty and the geography of climate change are even more pronounced globally.<sup>67</sup>

The elderly are especially vulnerable to climate change because many of them have exacerbating health conditions. The Environmental Protection Agency (EPA) identifies three main aspects of climate change that affect the elderly in particular: extreme heat, extreme weather events, and poor air

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“disproportionate number of economically disadvantaged people living only slightly above current sea levels” as “one of the biggest” reasons poor people will bear the brunt of climate change).

62. See Dale Kasler & Phillip Reese, “*The Weakest Link*”: *Why Your House May Burn While Your Neighbor’s Survives the Next Wildfire*, SACRAMENTO BEE (Apr. 11, 2019); Cassandra Johnson Gaither, Neelam C. Poudyal, Scott Goodrick, J.M. Bowker, Sparkle Malone & Jianbang Gan, *Wildland Fire Risk and Social Vulnerability in the Southeastern United States*, 13 FOREST POL’Y & ECON. 24, 24 (2011); Kathy Lynn & Wendy Gerlitz, *Mapping the Relationship Between Wildfire and Poverty*, in FUELS MANAGEMENT—HOW TO MEASURE SUCCESS: CONFERENCE PROCEEDINGS 401, 406–07 (2006), [https://www.fs.usda.gov/rm/pubs/rmrs\\_p041/rmrs\\_p041\\_401\\_415.pdf](https://www.fs.usda.gov/rm/pubs/rmrs_p041/rmrs_p041_401_415.pdf) [<https://perma.cc/BN8T-3QR9>] (measuring community capacity in the context of wildfires).

63. See Lovvorn, *supra* note 61, at 20 (discussing Hurricane Katrina in that context).

64. See Dana, *supra* note 6, at 75 (discussing how wealthier people in the United States have more resources “to adapt to climate related phenomena such as extreme heat, drought, wildfires, and flooding”).

65. Joey Marshall, Charlynn Burd & Michael Burrows, *Working from Home During the Pandemic: Those Who Switched to Telework Have Higher Income, Education and Better Health*, U.S. CENSUS BUREAU (Mar. 31, 2021), <https://www.census.gov/library/stories/2021/03/working-from-home-during-the-pandemic.html> [<https://perma.cc/T7UK-MT3R>] (finding that in households with annual incomes of \$200,000 or more, 73.1 percent switched to telework compared to 12.7 percent of households earning under \$25,000).

66. Leah Platt Boustan, Matthew E. Kahn, Paul W. Rhode & Maria Lucia Yanguas, *The Effect of Natural Disasters on Economic Activity in US Counties: A Century of Data* 1–3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 23410, 2017), [https://www.nber.org/system/files/working\\_papers/w23410/w23410.pdf](https://www.nber.org/system/files/working_papers/w23410/w23410.pdf) [<https://perma.cc/9Z5C-JJE9>].

67. See STEPHANE HALLEGATTE, MOOK BANGALORE & LAURA BONZANIGO, SHOCK WAVES: MANAGING THE IMPACTS OF CLIMATE CHANGE ON POVERTY 3–6 (2016); Chuck Hagel, *Foreword to U.S. DEP’T OF DEFENSE, 2014 CLIMATE CHANGE ADAPTATION ROADMAP*, at i (2014), [https://www.acq.osd.mil/eie/downloads/CCARprint\\_wForward\\_e.pdf](https://www.acq.osd.mil/eie/downloads/CCARprint_wForward_e.pdf) [<https://perma.cc/2XPK-ETMJ>] (concluding that climate change will “intensify the challenges of global instability, hunger, poverty, and conflict” and cause “food and water shortages, pandemic disease, disputes over refugees and resources, and destruction by natural disasters in regions across the globe”).



quality.<sup>68</sup> Extreme heat and higher temperatures can increase the risk of illness or death in older adults, particularly those with congestive heart failure, diabetes, and other conditions that increase heat sensitivity.<sup>69</sup> Heat waves tend to “have the most severe impacts for the elderly and the very young, who sweat less and have a greater surface area-to-body-mass ratio.”<sup>70</sup> Higher temperatures have also been linked to increased hospitalizations for older people with heart and lung conditions.<sup>71</sup> Older adults with limited incomes who own air conditioning units may not use them during heat waves due to the high cost to operate them.<sup>72</sup>

The elderly are also more likely to suffer storm- and flood-related fatalities. Many of the people who died as a result of Hurricane Katrina, Superstorm Sandy, and the 2018 Camp Fire in California were elderly.<sup>73</sup> If an event requires evacuation, some of the most vulnerable people are older people with disabilities, with chronic medical conditions, or living in nursing homes or assisted-living facilities.<sup>74</sup> Furthermore, climate-fueled disasters can make it more difficult to transport patients with their necessary medication, medical records, and equipment.<sup>75</sup> Climate-fueled disasters can also cause power outages that knock out medical equipment and elevators, leaving some people without treatment or the ability to evacuate.<sup>76</sup>

As the climate crisis contributes to worsening air quality, the number of older adults admitted to emergency rooms will increase.<sup>77</sup> Poor air quality worsens respiratory conditions common in older adults such as asthma and chronic obstructive pulmonary disorder. Air pollution can also increase the risk of heart attack in older adults, especially those who are diabetic or obese.<sup>78</sup>

Children will also be particularly vulnerable in this new climate reality. The American Academy of Pediatrics identifies various climate-related threats to children: the physical and psychological effects of extreme weather events, heat stress, decreased air quality, and food insecurity.<sup>79</sup> Additionally, the report states

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68. *Climate Change and the Health of Older Adults*, ENV'T PROT. AGENCY (Dec. 13, 2022), <https://www.epa.gov/climateimpacts/climate-change-and-health-older-adults> [https://perma.cc/WL59-F9BZ].

69. *Id.*

70. Sheridan Bartlett, *The Implications of Climate Change for Children in Lower-Income Countries*, 18 CHILD., YOUTH & ENV'T 71, 80 (2008).

71. *Climate Change and the Health of Older Adults*, *supra* note 68.

72. *Id.*

73. *Id.*; see also Maria L. La Ganga, Laura Newberry, Paige St. John & Rong-Gong Lin II, *Many Victims of California's Worst Wildfire Were Elderly and Died in or near Their Homes*, *New Data Show*, L.A. TIMES (Dec. 13, 2018), <https://www.latimes.com/local/lanow/la-me-ln-paradise-fire-dead-map-20181213-story.html> [https://perma.cc/DB99-MAP4].

74. *Climate Change and the Health of Older Adults*, *supra* note 68.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Samantha Ahdoot, *Global Climate Change and Children's Health*, 138 PEDIATRICS 1468, 1468 (2015).

that the social foundations of children’s mental and physical health are threatened by the effects of climate change, including community and global instability, mass migrations, and increased conflict.<sup>80</sup> Unchecked climate change threatens the safety and well-being of children by way of its effects on families, schools, neighborhoods, and communities, including the long-term ramifications of school closures.<sup>81</sup>

Children are also uniquely at risk from climate-induced disasters, such as wildfires, hurricanes, and floods.<sup>82</sup> Such events “cause irrevocable harm to children through devastation of their homes, schools, and neighborhoods,” which, in turn, impairs their physiological, cognitive, and social development.<sup>83</sup> According to the World Health Organization, children under five bear 88 percent of the burden of disease attributable to climate change.<sup>84</sup> Children are also “more likely than adults to perish during natural disasters,”<sup>85</sup> “more likely to ‘succumb to malnutrition, injuries, or disease in the aftermath,’” less likely to receive healthcare and other aid, and more likely to be subjected to exploitation or abuse.<sup>86</sup>

As a result, the climate crisis will create significant demands on government to respond to surges in need among poor people as well as the elderly, people with disabilities, and children. The next Part explores how federal law currently structures the government response.

## II.

### WELFARE PROGRAMS AND DISASTERS: THE STATUS QUO

With some important exceptions, the federal government finances but does not administer assistance to poor Americans.<sup>87</sup> States, territories, and Tribes do. In some cases, states also contribute to the financing of these national programs.

80. *Id.* at 1478; *see also* Francesco Agostinelli, Matthias Doepke, Giuseppe Sorrenti & Fabrizio Zilibotti, *When the Great Equalizer Shuts Down: Schools, Peers, and Parents in Pandemic Times*, 206 J. PUB. ECON. 104574 (2022) (concluding that children living in the poorest 20 percent of U.S. neighborhoods will experience the most negative and long-lasting effects of school closures).

81. *See* Ahdoot, *supra* note 79, at 1475.

82. *See, e.g.*, Mary Prunicki, Rodd Kelsey, Justin Lee, Xiaoying Zhou, Edward Smith, Francois Haddad, Joseph Wu & Kari Nadeau, *The Impact of Prescribed Fire Versus Wildfire on the Immune and Cardiovascular Systems of Children*, 74 ALLERGY 1989, 1989 (2019); David Mills, Russell Jones, Cameron Wobus, Julia Ekstrom, Lesley Jantarasami, Alexis St. Juliana & Allison Crimmins, *Projecting Age-Stratified Risk of Exposure to Inland Flooding and Wildfire Smoke in the United States Under Two Climate Scenarios*, 126 ENV’T HEALTH PERSPS., no. 4, 2018, at 1.

83. Ahdoot, *supra* note 79, at 1475.

84. Ying Zhang, Peng Bi & Janet E. Hiller, *Climate Change and Disability-Adjusted Life Years*, 70 J. ENV’T HEALTH 32, 33 (2007).

85. UNICEF, CLIMATE CHANGE AND CHILDREN 6 (2007) [https://www.unicef.org/publications/files/Climate\\_Change\\_and\\_Children.pdf](https://www.unicef.org/publications/files/Climate_Change_and_Children.pdf) [<https://perma.cc/F3DB-WYLU>].

86. Lovvorn, *supra* note 61, at 35–36.

87. The Internal Revenue Service administers the EITC, 26 U.S.C. § 32, and the Social Security Administration administers SSI, 42 U.S.C. § 1381.

The underlying federalism of social provision in the United States has profound implications. State, territorial, and tribal governments vary widely in their administration of public benefits.<sup>88</sup> But the federal financing of many of these programs has incentivized states to expand access. The federal government has leveraged that fiscal federalism in recent years to improve access.<sup>89</sup> Federal law permits legal aid lawyers to sue state and local governments when they violate program requirements.<sup>90</sup>

Many public benefit programs in the United States have some disaster response provision that offers state and territorial governments additional flexibility and funds. However, this dimension of welfare assistance only comes into play after the President has issued a disaster declaration for an impacted area. What follows is first a brief sketch of the procedure for those declarations and then an analysis of the statutes, regulations, and subregulatory guidance that structure how the federal, state, territorial, and tribal governments can use public benefit programs in response to a disaster.

#### A. *Activating Federal Disaster Welfare Programs*

The Stafford Act structures the roles federal, state, territorial, and tribal governments play in disaster relief.<sup>91</sup> In order to trigger the response and recovery provisions of the Stafford Act as well as the attendant federal welfare programs, the President must declare that a “major disaster” or “emergency” exists.<sup>92</sup> The major disaster declaration is more relevant for our purposes because it is not subject to any funding cap and makes impacted areas eligible for a greater array of assistance.<sup>93</sup> As a result, its procedure is more complicated.

A major disaster declaration turns on the President’s determination that state and local efforts cannot adequately respond to the event.<sup>94</sup> First, a request must be made by the governor of the affected state or the equivalent chief executive of a federally recognized Tribe, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands (CNMI),

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88. See *supra* notes 40–47 and accompanying text.

89. See Hammond, *Litigating Welfare Rights*, *supra* note 30, at 382–87.

90. See *id.* at 387–90.

91. It is also the main substantive statute for FEMA. Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, 102 Stat. 4689 (1988) (codified as amended in scattered sections of 42 U.S.C.).

92. See 42 U.S.C. § 5122(1)–(2).

93. *Id.* § 5193(b); see also ELIZABETH M. WEBSTER, ERICA A. LEE & WILLIAM L. PAINTER, CONG. RSCH. SERV., STAFFORD ACT DECLARATIONS FOR COVID-19 FAQ 1 n.2 (2020), [https://www.everycrsreport.com/files/20200422\\_R46326\\_061c50951f8e07ef7b3e886227b05dcf6b7c127c.pdf](https://www.everycrsreport.com/files/20200422_R46326_061c50951f8e07ef7b3e886227b05dcf6b7c127c.pdf) [<https://perma.cc/4TVD-WHXY>] (“Compared to emergency declarations, major disaster declarations authorize a wider range of federal assistance.”). While the President can declare an “emergency” under the Stafford Act in the manner outlined above, the President can also do so *sua sponte* if, in the President’s opinion, that primary responsibility rests with the federal government based on the Constitution or other federal law. 42 U.S.C. § 5191(b); 44 C.F.R. § 206.35.

94. 42 U.S.C. § 5170; 44 C.F.R. § 206.36 (laying out procedure for major disaster declarations).

or the District of Columbia.<sup>95</sup> The executive of the state, Tribe, or territory sends the request to the relevant FEMA regional administrator who, in turn, evaluates the need for federal action, called a Preliminary Damage Assessment (PDA). The regional administrator then submits those findings to the Secretary of Homeland Security who shares them with the President to inform the President's decision about whether to declare a major disaster.<sup>96</sup>

Once the President declares a major disaster, the President directs federal agencies to support state and local efforts in whatever ways authorized by federal law.<sup>97</sup> The federal government can offer a range of assistance depending on the types of aid requested by the state, tribal, or territorial leader and the needs FEMA identified in the initial PDA or subsequent assessments.<sup>98</sup> Among the assistance the federal government can offer to state, territorial, and tribal governments is assistance to individual households. That type of assistance is the focus of the next Section.<sup>99</sup>

### *B. Welfare Programs as Disaster Assistance*

Following a disaster declaration, federal agencies can offer state, territorial, and tribal governments a range of public benefits for people in need. This Section analyzes both transfer programs and in-kind assistance. Specifically, this Section details the ins and outs of disaster food assistance, unemployment assistance, FEMA's income assistance program, housing assistance, means-tested health insurance, and legal services, in turn.

#### *1. Disaster Food Assistance*

The United States is unique among wealthy democracies in the role that food assistance plays in its welfare state. In a given month, the SNAP program

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95. 42 U.S.C. § 5122(4)–(5), (12); *see* Sandy Recovery Improvement Act of 2013, H.R. 219, 113th Cong. § 2 (2013) (amending Section 401 of the Stafford Act to allow federally recognized Indian tribal governments to request a declaration directly from the President); FED. EMERGENCY MGMT. AGENCY, TRIBAL DECLARATIONS PILOT GUIDANCE 24–34 (2017), <https://www.fema.gov/sites/default/files/2020-04/tribal-declaration-pilot-guidance.pdf> [<https://perma.cc/E4GV-7G6Z>]. President Biden recently did so for the Mashpee Wampanoag Tribe following Tropical Storm Henri. *See* Press Release, White House, President Joseph R. Biden, Jr. Approves the Mashpee Wampanoag Tribe Emergency Declaration (Aug. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/22/president-joseph-r-biden-jr-approves-the-mashpee-wampanoag-tribe-emergency-declaration/> [<https://perma.cc/6G78-RCYV>].

96. Following the declaration, state, territorial, and tribal authorities can request additional designations and cost-sharing adjustments, and FEMA can make an independent recommendation of the same. 44 C.F.R. § 206.40(c)–(d); *id.* § 206.47(b).

97. 42 U.S.C. § 5170a(2).

98. Exec. Order No. 12,673, 54 Fed. Reg. 12571 (Mar. 23, 1989) (delegating several functions in Stafford Act to FEMA).

99. *See* CONG. RSCH. SERV., A BRIEF OVERVIEW OF FEMA'S PUBLIC ASSISTANCE PROGRAM (Mar. 28, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF11529> [<https://perma.cc/7AKJ-TQDP>]; *Hazard Mitigation Assistance Grants*, FED. EMERGENCY MGMT. AGENCY (Nov. 1, 2021), <https://www.fema.gov/grants/mitigation/> [<https://perma.cc/RXW5-DGPV>].

serves over forty million Americans, and benefits cost nearly \$60 billion dollars each year.<sup>100</sup> In addition to regular SNAP benefits, federal law allows states to deliver emergency food assistance to SNAP households in the wake of disasters. Households may seek replacement benefits for food purchased with SNAP benefits that was “destroyed in a household misfortune.”<sup>101</sup> However, this individualized process is inefficient following a major disaster. That is why some states have obtained waivers from the Food and Nutrition Service (FNS) to automatically replace benefits for all SNAP recipients in areas impacted by a disaster.<sup>102</sup> For instance, after Hurricane Harvey, FNS approved a request by Texas to automatically replace two months of SNAP benefits to households in the thirty-two declared counties.<sup>103</sup> Furthermore, some SNAP recipients may need additional assistance, not just because they lost food in the disaster, but because they lost income as a result of losing their jobs or are facing disaster-related expenses. Those recipients may receive supplemental SNAP benefits in addition to replacement benefits.<sup>104</sup>

In addition to replacement and supplemental SNAP benefits, the federal government pays for, and states administer, a separate emergency food assistance program: the Disaster Supplemental Nutrition Assistance Program (D-SNAP).<sup>105</sup> D-SNAP is intended to provide food assistance to households who have suffered food loss or damage as a result of a disaster and who are not currently receiving SNAP.<sup>106</sup> Federal and state governments must coordinate to

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100. FOOD & NUTRITION SERV., SNAP DATA TABLES: LATEST AVAILABLE MONTH—JULY 2022 STATE LEVEL PARTICIPATION AND BENEFITS, <https://fns-prod.azureedge.us/sites/default/files/resource-files/29SNAPcurrPP-10.pdf> [<https://perma.cc/X4ZU-8GGV>]; FOOD & NUTRITION SERV., PROGRAM INFORMATION REPORT tbl.2 (2020).

101. 7 C.F.R. § 274.6. The benefit can equal up to the value of the maximum monthly allotment for the household. 7 U.S.C. § 2014(h)(3)(A); 7 C.F.R. § 274.6(a)(3)(iii); *see, e.g.*, All County Letter No. 21-15 from Jennifer Hernandez, Deputy Dir., Cal. Dep’t of Soc. Servs., to All Cnty. Welfare Dep’ts, 2 (Feb. 5, 2021), <https://cdss.ca.gov/Portals/9/Additional-Resources/Letters-and-Notices/ACLs/2021/21-15.pdf> [<https://perma.cc/3Z5H-GH7Z>]; *LSNC Guide to CalFresh Benefits*, LEGAL SERVS. OF N. CAL., <http://calfresh.guide/getting-food-assistance-after-a-disaster-or-household-misfortune> [<https://perma.cc/A5RD-U6TX>] (explaining that state agencies can “replace the actual value of food destroyed in a disaster such as a fire or flood” for a person already receiving SNAP).

102. *See, e.g.*, *North Carolina Disaster Nutrition Assistance*, FOOD & NUTRITION SERV. (Sept. 29, 2021), <https://www.fns.usda.gov/disaster/north-carolina-disaster-nutrition-assistance> [<https://perma.cc/6QVB-RG5Z>].

103. *See, e.g.*, *Texas Disaster Nutrition Assistance*, FOOD & NUTRITION SERV. (Feb. 24, 2021), <https://www.fns.usda.gov/disaster/texas-disaster-nutrition-assistance> [<https://perma.cc/Z8J8-RF2E>].

104. FLA. BAR FOUND., FLORIDA DISASTER ASSISTANCE MANUAL FOR LEGAL SERVICES ADVOCATES 58–64 (2014), <https://thefloridabarfoundation.org/wp-content/uploads/2016/10/Disaster070214Manual.pdf> [<https://perma.cc/HJ5B-K8H2>]. SNAP households can also receive expedited food assistance. 7 C.F.R. § 273.2(a)(2).

105. *Disaster Supplemental Nutrition Assistance Program (D-SNAP)*, U.S. DEP’T OF HOMELAND SEC. (June 23, 2022), <https://www.disasterassistance.gov/get-assistance/forms-of-assistance/5769> [<https://perma.cc/H7XJ-ZQ2A>].

106. 7 U.S.C. § 2014(h); 7 C.F.R. § 280.

initiate D-SNAP for each federally declared disaster.<sup>107</sup> After the President has issued a major disaster declaration for individual assistance under the Stafford Act, as discussed above, a state must first request permission from the federal FNS to operate D-SNAP.<sup>108</sup> Once granted permission, states can begin accepting D-SNAP applications during a specified period, typically seven days.<sup>109</sup> As with SNAP, the federal government pays for 100 percent of D-SNAP benefits and roughly half of the administrative costs.<sup>110</sup>

D-SNAP has relaxed eligibility criteria compared to SNAP. A recipient simply must reside in the disaster area, purchase or plan to purchase food during the benefit period, experience an adverse effect due to the disaster, and meet a fairly generous income limit.<sup>111</sup> The federal government recommends residency and income information be verified where possible and that household composition and food loss be verified if questionable. However, only the identity of the applicant must be verified.<sup>112</sup> Those who apply and qualify for D-SNAP receive a single monthly benefit, which equals the maximum monthly allotment for a household provided under SNAP.<sup>113</sup> Currently, that is \$658 for a household of three in the continental United States with higher benefit amounts for households in Alaska, Guam, Hawaii, and the U.S. Virgin Islands.<sup>114</sup>

As a result of the federal funding formula and relaxed eligibility standards, D-SNAP is an integral part of disaster recovery.<sup>115</sup> As mentioned above, the 2017 hurricane season was one of the most active seasons on record. Three Category 4 storms (Harvey, Irma, and Maria) made landfall in less than a month. In the wake of those disasters, over three million households in Texas, Florida, and the U.S. Virgin Islands received food assistance through D-SNAP and replacement

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107. FOOD & NUTRITION SERV., DISASTER SNAP GUIDANCE 1 (May 18, 2012) [hereinafter D-SNAP GUIDANCE], [https://njcdd.org/wp-content/uploads/2016/08/d-snap\\_handbook.pdf](https://njcdd.org/wp-content/uploads/2016/08/d-snap_handbook.pdf) [<https://perma.cc/6UX4-W6TL>] (explaining that “[t]he State has the primary role for planning, requesting, and operating a D-SNAP”).

108. See *FNS’ Role in Disaster Response*, U.S. DEP’T OF AGRIC. (Jul. 29, 2021), <https://www.usda.gov/media/blog/2019/05/10/fns-role-disaster-response> [<https://perma.cc/4TKH-39M5>] (explaining agency’s responsibilities).

109. D-SNAP GUIDANCE, *supra* note 107, at 9 (detailing the application period).

110. 7 U.S.C. § 2025; see FOOD & NUTRITION SERV., EXPLORING THE CAUSES OF STATE VARIATION IN SNAP ADMINISTRATIVE COSTS: FINAL REPORT 2 (June 2019), <https://fns-prod.azureedge.us/sites/default/files/media/file/SNAP-State-Variation-Admin-Costs-FullReport.pdf> [<https://perma.cc/T9TH-KLUC>].

111. See D-SNAP GUIDANCE, *supra* note 107, at 12–13.

112. *Id.* at 17.

113. U.S. DEP’T OF AGRIC., DISASTER SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (D-SNAP) FISCAL YEAR (FY) 2022 INCOME ELIGIBILITY STANDARDS, <https://fns-prod.azureedge.us/sites/default/files/media/file/FY2022-DSNAP-IncomeEligibilityStandards-reviewed.pdf> [<https://perma.cc/KKD8-6LWZ>] (effective October 1, 2021, through September 30, 2022).

114. Compare *id.* tbl.1, with *id.* tbls.2–4.

115. Super, *Against Flexibility*, *supra* note 21, at 1453 (arguing that FNS was “[t]he one federal agency that mounted a major Katrina relief effort without significant public criticism” because the agency “had made most of the crucial decisions well in advance of the disaster”).

benefits.<sup>116</sup> While D-SNAP recipients typically receive one month of benefits, the federal government has recently begun approving longer benefit periods, including following the 2017 storms.<sup>117</sup>

D-SNAP, like many welfare programs in the United States, excludes Americans who live in territories or are members of Tribes. Because the Food and Nutrition Act treats Guam and the U.S. Virgin Islands on the same level as states, these two territories have benefited from both SNAP and D-SNAP.<sup>118</sup> Yet, federal law excludes American Samoa, Puerto Rico, and CNMI from SNAP and by extension D-SNAP.<sup>119</sup> As discussed in Part III, the federal exclusion of Puerto Rico exacerbated the island's challenges after Hurricane Maria. Similarly, D-SNAP has inconsistent and limited reach among federally recognized Tribes. Some Tribes choose to participate in the Food Distribution Program on Indian Reservations (FDPIR) instead of SNAP, but a household's post-disaster participation in FDPIR disqualifies them from receiving D-SNAP.<sup>120</sup>

Furthermore, D-SNAP can only function if the ways in which most Americans purchase food are available. Like SNAP, D-SNAP relies on typical channels of food distribution. Federal law therefore allows federal and state agencies to channel other types of food assistance to people following disasters when grocery stores cannot stay open. Following a major disaster declaration, states can get permission from FNS to release commodity foods from federal programs and send them to congregate feeding sites or directly to households.<sup>121</sup> The federal agency will then replace the commodity foods after the disaster.<sup>122</sup> After Hurricane Katrina, congregate feeding sites operated for over two months in this fashion. Ten months after the storm, some households continued to receive food directly from the government.<sup>123</sup>

Federal law also allows states to waive requirements to child nutrition and school meals programs to feed more people.<sup>124</sup> After Sandy, New York was

116. U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERVICE DISASTER RESPONSE SUMMARY: FY 2017, <https://fns-prod.azureedge.us/sites/default/files/resource-files/FNS-Disaster-Response-Summary-FY17.pdf> [<https://perma.cc/7C2M-U8MU>].

117. Compare D-SNAP GUIDANCE, *supra* note 107, at 1 (stating that "D-SNAP provides one month of benefits to eligible disaster survivors"), with, e.g., Bulletin 17-13 from Regina Carter, Dir., Tex. Health & Hum. Servs. Comm'n, to Regional Dirs. 4 (Sept. 26, 2017), <https://www.hhs.texas.gov/sites/default/files/documents/laws-regulations/handbooks/twh/bulletin2020/17-13-revised.pdf> [<https://perma.cc/4N3J-LJCW>] (stating that "Hurricane Harvey D-SNAP households will receive two full-months of D-SNAP allotments").

118. 7 U.S.C. § 2012(r).

119. Hammond, *Territorial Exceptionalism*, *supra* note 31, at 1670–72.

120. D-SNAP GUIDANCE, *supra* note 107, at 12.

121. FOOD RSCH. & ACTION CTR., THE FRAC ADVOCATE'S GUIDE TO THE DISASTER SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (D-SNAP) 7 (2018) [hereinafter ADVOCATE'S GUIDE TO D-SNAP], <https://frac.org/wp-content/uploads/d-snap-advocates-guide-1.pdf> [<https://perma.cc/SR92-HUZ2>].

122. *Id.*

123. *Id.*

124. Letter from Cynthia Long, Deputy Adm'r, Child Nutrition Programs, Food & Nutrition Serv. 2 (May 19, 2014), <https://fns->

allowed to provide free meals to displaced families in New York City, regardless of income.<sup>125</sup> After Harvey, the federal government permitted impacted schools to recalculate the number of students who qualified for free and reduced school meals.<sup>126</sup> After the wildfires in 2017, the federal government allowed Oregon to use its Summer Food Service Program to send children home with meals.<sup>127</sup> Oregon sought this waiver because some of the schools where the children would eat were under air quality alerts issued by the National Weather Service.<sup>128</sup> In addition, while the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) has no statutory disaster provision, it has been adapted in the past to accommodate disaster conditions with ready-to-feed infant formula and other food items that do not require refrigeration.<sup>129</sup> Thus, there are significant opportunities for increased federal food assistance in the wake of disasters, provided states, territorial, and tribal governments apply and receive approval.<sup>130</sup>

## 2. Disaster Unemployment Assistance

Like other wealthy nations, the United States has a national system of UI. However, in the United States, UI has a racialized past and present. Members of Congress crafted the Social Security Act of 1935 to exclude domestic and agricultural workers—sectors of the labor force that disproportionately employed women, Black people, and immigrants—from UI.<sup>131</sup> Today, the federal government has not updated UI to address the realities of modern working conditions. In many states, UI excludes people who are working gig jobs, those looking for part-time work, and those who leave their jobs to care for

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prod.azureedge.us/sites/default/files/cn/SP46\_CACFP12\_SFSP%2018-2014os.pdf [https://perma.cc/5U34-5SEG]. See generally Sherry Maria Tanious, *Schoolhouse Property*, 131 YALE L.J. 1641, 1686–98 (2022) (discussing evolution of federal and state school meal programs).

125. *USDA Will Fund Free Meals for NYC Schools Post-Sandy*, PATCH (Dec. 3, 2012), <https://patch.com/new-york/windsorterrace/usda-will-fund-free-meals-for-nyc-schools-post-sandy-934dc124> [https://perma.cc/AH7N-WVBK].

126. ADVOCATE’S GUIDE TO D-SNAP, *supra* note 121, at 8.

127. See FNS Press Release, *supra* note 13.

128. *Id.*

129. ADVOCATE’S GUIDE TO D-SNAP, *supra* note 121, at 10–12.

130. However, many of these practices are governed only by agency guidance, which is not binding. For instance, while the U.S. Department of Agriculture promulgated a final version of its proposed rule for Disaster SNAP in 2016, the Trump administration withdrew the proposed rule along with others, purportedly to reduce regulatory backlog. Supplemental Nutrition Assistance Program (SNAP): Disaster Supplemental Nutrition Assistance Program (D-SNAP), 81 Fed. Reg. 28738 (May 10, 2016) (to be codified at 7 C.F.R. pts. 272, 274, 280); Withdrawal of Certain Proposed Rules, 84 Fed. Reg. 47443 (Sept. 10, 2019) (withdrawing Emergency Supplemental Nutrition Assistance for Victims of Disasters Procedures).

131. See CYBELLE FOX, *THREE WORLDS OF RELIEF: RACE, IMMIGRATION, AND THE AMERICAN WELFARE STATE FROM THE PROGRESSIVE ERA TO THE NEW DEAL* 250–89 (2012) (discussing these features of the Social Security Act).



an ill family member.<sup>132</sup> These exclusions disproportionately impact women, Black people, Latinx people, and immigrants.<sup>133</sup>

Unlike SNAP, though, the federal government does not cover the cost of unemployment benefits. The federal government contributes to funding the administration of each state's UI program, but the states finance most of the programs' benefits. States also administer the program subject to only a few federal requirements. While employers and employees contribute to these state systems via payroll taxes, states repeatedly underfund their UI programs.<sup>134</sup> In most states, unemployed workers can receive up to twenty-six weeks of benefits at a rate of about half of their previous wages or a maximum benefit amount, whichever is higher. In February 2020, the average weekly benefits were about \$387 nationwide and ranged from \$215 in Mississippi to \$550 in Massachusetts.<sup>135</sup> As we will see in Part III, Congress passed significant legislation to shore up these state UI programs in the face of the COVID-19 pandemic.<sup>136</sup>

The Stafford Act authorizes the federal government to let states set up Disaster Unemployment Assistance (DUA).<sup>137</sup> However, unlike UI, which is largely funded by the states, DUA is financed through the Disaster Relief Fund (DRF). Congress funds the DRF with annual appropriations that carry over year to year.<sup>138</sup> Just as D-SNAP mirrors SNAP's structure, DUA uses a similar administrative apparatus to typical, non-emergency UI.<sup>139</sup> The U.S. Department of Labor oversees the program, but state agencies administer it.<sup>140</sup> Individuals receive DUA for their weeks of unemployment during a Disaster Assistance

132. See *Unemployment Insurance Chartbook*, U.S. DEP'T OF LAB. (Jan. 12, 2022), <https://oui.doleta.gov/unemploy/chartbook.asp> [<https://perma.cc/GG7P-KS75>]; see also Brian Galle, *How to Save Unemployment Insurance*, 50 ARIZ. ST. L.J. 1009, 1023 (2018) (discussing UI's limitations); Benjamin Della Rocca, *Unemployment Insurance for the Gig Economy* 131 YALE L.J.F. 799, 803–06 (2022) (noting self-employed workers are categorically ineligible for UI).

133. JOSH BIVENS, MELISSA BOTEACH, RACHEL DEUTSCH, FRANCISCO DÍEZ, REBECCA DIXON, BRIAN GALLE, ALIX GOULD-WERTH, NICOLE MARQUEZ, LILY ROBERTS, HEIDI SHIERHOLZ & WILLIAM SPRIGGS, ECON. POL'Y INST., REFORMING UNEMPLOYMENT INSURANCE 1 (2021), <https://files.epi.org/uploads/Reforming-Unemployment-Insurance.pdf> [<https://perma.cc/K3G7-VK62>].

134. See Tatiana Follett & Zach Herman, *Unemployment Insurance Funding Overview*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 8, 2020), <https://www.ncsl.org/research/labor-and-employment/new-ui-page.aspx> [<https://perma.cc/GHZ6-T7X4>].

135. CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: UNEMPLOYMENT INSURANCE 1 (2021) [hereinafter UI BASICS], [https://www.cbpp.org/sites/default/files/atoms/files/policybasic\\_introtoui.pdf](https://www.cbpp.org/sites/default/files/atoms/files/policybasic_introtoui.pdf) [<https://perma.cc/DAW9-2M9C>].

136. See *infra* Part III.C.1.

137. See 42 U.S.C. § 5177(a).

138. See, e.g., U.S. DEP'T OF HOMELAND SEC., FEDERAL EMERGENCY MANAGEMENT AGENCY DISASTER RELIEF FUND: FISCAL YEAR 2019 CONGRESSIONAL JUSTIFICATION (Feb. 2018), <https://www.dhs.gov/sites/default/files/publications/Federal%20Emergency%20Management%20Agency.pdf> [<https://perma.cc/762E-RGGJ>].

139. See 20 C.F.R. § 625.15.

140. See *id.* §§ 625.1–.30 (laying out structure and procedure of DUA).

Period (DAP). Like the benefit period of D-SNAP, the DAP commences immediately after the major disaster begins. However, unlike D-SNAP, which typically lasts only a month, DUA can continue for up to twenty-six weeks after that date. Congress has extended DUA past the twenty-six week limit three times: following the September 11th terrorist attacks, Hurricane Katrina in 2005, and Hurricanes Irma and Maria in 2017.<sup>141</sup> In the most recent extension, Congress added twenty-six weeks (up to fifty-two weeks total) for persons who were unemployed in Puerto Rico or the U.S. Virgin Islands as a direct result of Hurricanes Irma and Maria.<sup>142</sup> Unlike D-SNAP, though, the benefit levels of DUA are not uniform across the country. Rather, the benefit levels equal the prevailing weekly benefit amounts of each state's UI program and cannot exceed them.<sup>143</sup> While minimum weekly benefits cannot drop below half of the average benefit amount in the relevant state, DUA perpetuates significant variation in benefit levels across states and the territories.<sup>144</sup>

Like D-SNAP, DUA is available to those who are ineligible for regular state UI. However, here, the distributive consequences are flipped. Whereas D-SNAP is potentially regressive because it does not reach people already poor enough to receive SNAP, DUA's structure is potentially progressive. To qualify for DUA, a person must have lost their job or be unable to access their job as a result of a major disaster *and* that person must be ineligible for regular UI. Because UI is less likely to cover part-time workers, including those in the gig economy and those who are unemployed because they need to care for a family member, states have an opportunity with DUA to overcome UI's patchy coverage.

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141. See Act of Mar. 25, 2002, Pub. L. No. 107-154, 116 Stat. 80 (2002) (codified as amended at 42 U.S.C. § 5177) (extending DUA from twenty-six to thirty-nine weeks for major disaster areas in New York and Virginia); Katrina Emergency Assistance Act of 2006, Pub. L. No. 109-176, 120 Stat. 191 (2006) (codified as amended at 42 U.S.C. § 5177) (same, but for victims of Hurricanes Katrina and Rita); FAA Reauthorization Act of 2018, Pub. L. No. 115-254, 132 Stat. 3186, 3459 (2018) (extending DUA retroactively for an additional twenty-six weeks for unemployed persons in Puerto Rico and the U.S. Virgin Islands); see also CONG. RSCH. SERV., DISASTER UNEMPLOYMENT ASSISTANCE (DUA) 4 (2020), <https://fas.org/sgp/crs/misc/RS22022.pdf> [<https://perma.cc/A4UH-F2J3>] (describing the legislation).

142. FAA Reauthorization Act of 2018, Pub. L. No. 115-254, 132 Stat. 3186, 3459 (2018).

143. 20 C.F.R. § 625.6(a). Federal regulations establish a different benefit formula for territories. See *id.* § 625.6(c)–(d).

144. See Letter from John Pallasch, Assistant Sec'y, U.S. Dep't of Lab., to State Workforce Agencies attach. 1 (June 25, 2020), [https://www.dol.gov/sites/dolgov/files/ETA/advisories/UIPL/2020/UIPL\\_26-20.pdf](https://www.dol.gov/sites/dolgov/files/ETA/advisories/UIPL/2020/UIPL_26-20.pdf) [<https://perma.cc/76HA-SMEU>]; see also CTR. ON BUDGET & POL'Y PRIORITIES, UI BASICS, *supra* note 135, at 1 (detailing that “before the start of the COVID-19 recession in February 2020, average weekly benefits were about \$387 nationwide but ranged from a low of \$215 in Mississippi to \$550 in Massachusetts, and were only \$161 in Puerto Rico”).

### 3. Other Income Assistance

In addition to DUA and D-SNAP, other public benefits provide income assistance to people recovering from disasters. Federal law permits expedited or advanced payments to individuals who receive Social Security Old Age Insurance (OASDI), Social Security Disability Insurance (SSDI), and Supplemental Security Income, but recipients need to request these expedited payments.<sup>145</sup> Moreover, in the past, Congress has occasionally allowed eligible taxpayers to elect to use their prior year's filing to calculate their current year's EITC following a major disaster.<sup>146</sup> Like DUA and unlike SNAP, these other income assistance programs do not restrict how recipients can use this assistance.

Temporary Assistance to Needy Families (TANF) has played a rather minor role in providing cash assistance after disasters. As part of the 1996 welfare reform legislation, Congress established a TANF contingency fund for states to deliver additional assistance in times of increased need, but as the U.S. Government Accountability Office (GAO) has explained, it “has not proven to be an inviting option to states in need for several reasons.”<sup>147</sup> Congress passed legislation to create a separate TANF emergency fund for states impacted by Katrina, but there too, few people received assistance.<sup>148</sup> As a result, there is limited evidence that TANF plays an important role in disaster relief.<sup>149</sup>

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145. See 20 C.F.R. § 416.520 (describing “emergency advance payments” for SSI); SOC. SEC. ADMIN., *RS 0281.010 Immediate Payment (IP) Criteria and Process, in PROGRAM OPERATIONS MANUAL SYSTEM (POMS)* (2022), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0302801010> [<https://perma.cc/EKF9-B6DU>] (same for OASDI and SSDI); see also U.S. GOV'T ACCOUNTABILITY OFF., HURRICANES KATRINA AND RITA: FEDERAL ACTIONS COULD ENHANCE PREPAREDNESS OF CERTAIN STATE-ADMINISTERED FEDERAL SUPPORT PROGRAMS 20 (2007) [hereinafter HURRICANES KATRINA AND RITA], <https://www.gao.gov/assets/gao-07-219.pdf> [<https://perma.cc/L98E-JXEZ>] (charting the “dramatic increase” in immediate payments in 2005 compared to 2004).

146. Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, § 406, 119 Stat. 2016, 2028 (2005); Heartland Disaster Tax Relief Act of 2008, Pub. L. No. 110-343, § 701, 122 Stat. 3765, 3912 (2008); Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115-63, § 504, 131 Stat. 1168, 1183 (2017); see also CONG. RSCH. SERV., TAX POLICY AND DISASTER RECOVERY 1–2 (2020), <https://crsreports.congress.gov/product/pdf/R/R45864/3> [<https://perma.cc/5VCP-4L3E>] (discussing these statutory changes).

147. See U.S. GOV'T ACCOUNTABILITY OFF., HURRICANES KATRINA AND RITA DISASTER RELIEF: CONTINUED FINDINGS OF FRAUD, WASTE, AND ABUSE 18 (2007), <https://www.gao.gov/assets/gao-07-252t.pdf> [<https://perma.cc/Q8T9-MJQC>] (identifying various challenges including difficulties in enrollment, significant programmatic differences among states, and insufficient staff); see also Andrew Hammond, *Welfare and Federalism's Peril*, 92 WASH. L. REV. 1721, 1751–52 (2017) (discussing TANF's dismal post-Katrina record); Super, *Against Flexibility*, *supra* note 21, at 1454–56 (same).

148. TANF Emergency Response and Recovery Act of 2005, Pub. L. No. 109-68, 119 Stat. 2003 (2005); MARK GREENBERG, CTR. FOR L. & SOC. POL'Y, NEW TANF LAW PROVIDES ADDITIONAL FUNDS FOR KATRINA RELIEF: KEY IMPROVEMENTS STILL NEEDED 2 (2005) <https://www.clasp.org/sites/default/files/public/resources-and-publications/archive/0185.pdf> [<https://perma.cc/UNM4-J4UX>] (noting emergency TANF funds went unused prior to the TANF Emergency Response and Recovery Act of 2005 and explaining hurdles to states accessing these funds following the Act's enactment).

149. See HURRICANES KATRINA AND RITA, *supra* note 145, at 18–21; DAVID A. SUPER, PUBLIC WELFARE LAW 844–45 (2017) (comparing TANF post-Katrina unfavorably to D-SNAP).

FEMA itself administers some income assistance programs. Chief among them is the Individual and Household Program (IHP).<sup>150</sup> IHP is intended for anyone “who, as a direct result of a major disaster, [has] necessary expenses and serious needs in cases in which the individuals and households are unable to meet such expenses or needs through other means.”<sup>151</sup> Receipt of IHP benefits is limited to eighteen months following the date of the major disaster declaration.<sup>152</sup> The benefit amounts are set by statute at \$25,000, with FEMA adjusting the statutory cap each year based on the Department of Labor’s Consumer Price Index.<sup>153</sup> Right now, the IHP reimbursement cap stands at \$36,000.<sup>154</sup> There are two categories of assistance through IHP: Housing Assistance and Other Needs Assistance (ONA). The federal government shoulders the entire cost of the former and 75 percent of the latter.<sup>155</sup> ONA can cover various expenses like loss of personal property, childcare, funeral services, and other costs.<sup>156</sup> However, amounts of ONA assistance for each category are set beforehand by FEMA and the relevant state, territorial, or tribal government.<sup>157</sup> Housing assistance, the other category of FEMA’s IHP, is taken up next.

#### 4. Disaster Housing Assistance

FEMA and the U.S. Department of Housing and Urban Development (HUD) administer programs that involve both the provision of safe housing and

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150. 42 U.S.C. § 5174; 44 C.F.R. § 206.110(a); *see also* CONG. RSCH. SERV., FEMA INDIVIDUAL ASSISTANCE PROGRAMS: AN OVERVIEW 4 (2019) [hereinafter FEMA INDIVIDUAL ASSISTANCE PROGRAMS], <https://crsreports.congress.gov/product/pdf/R/R46014/3> [<https://perma.cc/W5AM-KEDP>] (describing IHP as “the primary way FEMA assists disaster survivors”); Jordan Ballard, Julia Howard-Gibbon, Brenda Muñoz Furnish & Aaron Scheinwald, *Natural Disasters, Access to Justice, and Legal Services*, 17 CUNY L. REV. 1, 6 (2013) (asserting that IHP is “the most significant source of benefits for individuals following a natural disaster”).

151. 42 U.S.C. § 5174(a).

152. FED. EMERGENCY MGMT. AGENCY, INDIVIDUAL ASSISTANCE PROGRAM AND POLICY GUIDE 7 (2021) [hereinafter IAPPG], [https://www.fema.gov/sites/default/files/documents/fema\\_iappg-1.1.pdf](https://www.fema.gov/sites/default/files/documents/fema_iappg-1.1.pdf) [<https://perma.cc/G4VN-477J>].

153. 42 U.S.C. § 5174(h) (capping IHP assistance at \$25,000 to be adjusted annually by FEMA according to the Labor Department’s CPI); 44 C.F.R. § 206.110(b) (same). Congress required that FEMA establish more objective criteria for evaluating the need for assistance and clarify eligibility requirements. *See* Disaster Relief Appropriations Act of 2013, Pub. L. No. 113-2, 127 Stat. 4, 47 (2013); 44 C.F.R. § 206.48(b).

154. Notice of Maximum Amount of Assistance Under the Individuals and Households Program, 85 Fed. Reg. 69340 (Nov. 2, 2020).

155. 42 U.S.C. § 5174(g)(1)–(2); 44 C.F.R. § 206.110(i)(1)–(2).

156. *See* IAPPG, *supra* note 152, at 42 fig.4; FED. EMERGENCY MGMT. AGENCY, CRITICAL NEEDS ASSISTANCE (2020), <https://www.fema.gov/fact-sheet/critical-needs-assistance> [<https://perma.cc/Y2DR-BSTF>]. ONA also includes Critical Needs Assistance, which comprises limited, one-time \$500 payments for immediate needs such as food, water, first aid, medications, and personal hygiene items. *See* FED. EMERGENCY MGMT. AGENCY, INDIVIDUALS AND HOUSEHOLD PROGRAM (IHP)—OTHER NEEDS ASSISTANCE ADMINISTRATIVE OPTION SELECTION, O.M.B. CONTROL No. 1660-0061 (expires Dec. 31, 2021), [https://www.fema.gov/sites/default/files/documents/fema\\_individuals-households\\_ONA-administrative-option\\_Form\\_010-0-11.pdf](https://www.fema.gov/sites/default/files/documents/fema_individuals-households_ONA-administrative-option_Form_010-0-11.pdf) [<https://perma.cc/HP2M-6DSN>].

157. *See* FEMA INDIVIDUAL ASSISTANCE PROGRAMS, *supra* note 150, at 7–8.

assistance with the payment of housing costs. These programs provide financial assistance to secure affordable temporary housing, home repairs, mortgage and rental payments, and new mortgages.<sup>158</sup> Taken together, these FEMA and HUD programs attempt to assist individuals whose homes have been damaged as a result of a disaster.

FEMA's housing assistance through IHP, like ONA discussed above, bypasses states. Instead, it is paid directly to eligible recipients and can cover various expenses. IHP's Financial Housing Assistance can provide funds for home repairs or replacement as well as reimbursement for short-term lodging or rental housing when a recipient is displaced from their home.<sup>159</sup> In addition, FEMA provides direct housing assistance for those survivors who otherwise lack access to housing in the impacted area.<sup>160</sup> For instance, FEMA provides transportable temporary housing units (TTHUs), like RVs or mobile homes.<sup>161</sup> FEMA purchases and then leases these TTHUs to eligible applicants for a limited period of time.<sup>162</sup>

HUD also provides disaster mortgage and rehabilitation assistance through its Federal Housing Administration (FHA).<sup>163</sup> Following a major disaster declaration, FHA activates a mortgagee letter—referred to as a Section 203(h) letter—that disaster survivors can submit to mortgage lenders to buy or rebuild their homes.<sup>164</sup> To secure a Section 203(h) letter, an individual must own and occupy a single-family home that was damaged or destroyed in a presidentially declared disaster. FHA also offers rehabilitation mortgage insurance—referred to as a Section 203(k) letter—that helps impacted households secure a mortgage that includes the cost of rehabilitation, finance the rehabilitation of their existing home, and afford smaller repairs.<sup>165</sup> To secure a Section 203(k) letter, an individual must be able to make monthly mortgage payments and be rehabilitating a home that's at least a year old.<sup>166</sup>

##### 5. *Disaster Assistance for Health Insurance*

Medicaid, which pays for health care for low-income Americans, becomes even more critical in the wake of a disaster. Medicaid is funded by both federal and state governments, but states administer the program.<sup>167</sup> Federal law requires

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158. *Id.* at 5–7.

159. *See* IAPPG, *supra* note 152, at 43–44.

160. *Id.* at 44.

161. *Id.*

162. *See id.*

163. *See HUD Disaster Resources*, U.S. DEP'T OF HOUS. & URB. DEV. (Sept. 3, 2021), <http://hud.gov/info/disasterresources> [<https://perma.cc/XQ67-GSTK>].

164. 12 U.S.C. § 1709(h); 24 C.F.R. § 203.1.

165. 12 U.S.C. § 1709(k)(4); 24 C.F.R. § 203.50.

166. *See 203(h) Mortgage Insurance for Disaster Victims and 203(k) Rehabilitation Mortgage Insurance*, U.S. DEP'T OF HOUS. & URB. DEV. (Aug. 5, 2022), <https://www.disasterassistance.gov/get-assistance/forms-of-assistance/4703> [<https://perma.cc/N6DF-QTZ2>].

167. 42 U.S.C. § 1396-1.

that states cover certain populations and services through Medicaid,<sup>168</sup> but states can also cover additional groups of people and additional services beyond what is required by federal law.<sup>169</sup> The federal government must provide states with matching funds, which vary in proportion to state wealth, referred to as the Federal Medical Assistance Percentage (FMAP).<sup>170</sup> Importantly, the Department of Health and Human Services (HHS) can provide states with some increased flexibility and support for their Medicaid programs following a disaster even in the absence of a major disaster declaration, provided the Secretary has declared a public health emergency.<sup>171</sup> However, state flexibility is maximized when both the Secretary and the President declare an emergency or disaster.

Following either a public health emergency declaration or a major disaster declaration, states may revise eligibility, enrollment, and benefits for Medicaid through state plan amendments or through Section 1115 waivers.<sup>172</sup> A state can relax its income eligibility requirements for certain populations,<sup>173</sup> waive verification processes for people in affected areas,<sup>174</sup> and temporarily suspend

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168. *Id.* § 1396a.

169. *Id.*; *see also* MEDICAID & CHIP PAYMENT & ACCESS COMM'N, FEDERAL REQUIREMENTS AND STATE OPTIONS: BENEFITS 5–7 (2017), <https://www.macpac.gov/wp-content/uploads/2017/03/Federal-Requirements-and-State-Options-Benefits.pdf> [<https://perma.cc/4DKT-RUXA>] (enumerating state options to cover additional groups or provide additional services).

170. 42 U.S.C. § 1396d *passim*.

171. *See* Public Health Service Act, Pub. L. No. 78-410, 58 Stat. 682 (1944) (codified at 42 U.S.C. § 247d).

172. *See* CMS: MEDICAID & CHIP COVERAGE LEARNING COLLAB., INVENTORY OF MEDICAID AND CHIP FLEXIBILITIES AND AUTHORITIES IN THE EVENT OF A PUBLIC HEALTH EMERGENCY OR DISASTER 2 (2022), <https://www.medicaid.gov/state-resource-center/downloads/mac-learning-collaboratives/medicaid-chip-inventory.pdf> [<https://perma.cc/KLE7-G3U>]; *see also* MEDICAID & CHIP PAYMENT & ACCESS COMM'N, ISSUE BRIEF: MEDICAID'S ROLE IN DISASTERS AND PUBLIC HEALTH EMERGENCIES 2–3 (2018) [hereinafter ISSUE BRIEF], <https://www.macpac.gov/wp-content/uploads/2018/03/Medicaid%E2%80%99s-Role-in-Disasters-and-Public-Health-Emergencies.pdf> [<https://perma.cc/3JJ5-V4VP>] (discussing state options). Last year, the Centers for Medicare and Medicaid Services (CMS) created a Medicaid State Plan Amendment template in response to all the state requests during the COVID-19 pandemic. CMS, SECTION 7—GENERAL PROVISIONS, 7.4. MEDICAID DISASTER RELIEF FOR THE COVID-19 NATIONAL EMERGENCY, <https://www.medicaid.gov/state-resource-center/downloads/medicaid-disaster-relief-spa-template.docx> [<https://perma.cc/S3FP-L9F3>]. Of course, immediately after a disaster, emergency medical services are crucial, but this Section focuses on continued access to health insurance.

173. 42 C.F.R. § 435.218.

174. *Id.* § 435.211 (Medicaid); *id.* § 457.342 (CHIP); *see* MEDICAID & CHIP PAYMENT & ACCESS COMM'N, ISSUE BRIEF, *supra* note 172, at 5; *see also, e.g., Louisiana Medicaid Provider Enrollment Disaster Relief*, CTRS. FOR MEDICAID & CHIP SERVS. (July 12, 2019), <https://www.medicaid.gov/state-resource-center/disaster-response-toolkit/federal-disaster-resources/entry/51943> [<https://perma.cc/NC8R-T4JR>] (noting CMS Section 1135 waiver granted to Louisiana in 2019 following Tropical Storm Barry); Press Release, Ctrs. for Medicare & Medicaid Servs., CMS Strengthens Federal Support to California Residents Affected by Wildfires (Nov. 14, 2018), <https://www.cms.gov/newsroom/press-releases/cms-strengthens-federal-support-california-residents-affected-wildfires-2> [<https://perma.cc/L6ZT-HAHX>]; Press Release, Ctrs. for Medicare & Medicaid Servs., CMS Offers Comprehensive Support for California Due to Wildfires (Aug. 28, 2020), <https://www.cms.gov/newsroom/press-releases/cms-offers-comprehensive-support-california-due->

co-payments and other costs to recipients.<sup>175</sup> For example, Puerto Rico's Medicaid plan typically only provides coverage for emergency services on-island, but the Centers for Medicare and Medicaid Services (CMS) granted the territory a Section 1115 waiver to permit recipients to receive off-island non-emergency coverage after Hurricane Maria.<sup>176</sup>

Federal law also requires that states facilitate Medicaid enrollment following disasters. For instance, federal regulations require that states accept self-attestation when an applicant's documentation is unavailable due to a disaster.<sup>177</sup> Federal law also prohibits states from denying or terminating Medicaid to residents who have had to evacuate temporarily to another state.<sup>178</sup> These flexibilities mitigate the extent to which cost is a barrier to health care access during a disaster. However, as with disaster food assistance, disaster provisions in Medicaid rely on typical channels of medical care, making the efficacy of these provisions contingent on the availability of medical care.

#### 6. *Disaster Legal Services*

Considering the intricacies of these different programs run by different agencies, individuals will need assistance gaining access and navigating the various program requirements. Fortunately, the Stafford Act includes legal services among its individual assistance categories.<sup>179</sup> Federal regulations stipulate that these legal services are intended to help individuals who were poor either before or because of the disaster. However, these services are limited in scope and are only provided to secure benefits or file claims arising out of the

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wildfires [<https://perma.cc/LZ4C-8AK2>] (describing a special enrollment period for people in California affected by wildfires).

175. 42 C.F.R. § 447.55(b)(4) (Medicaid); *id.* § 457.515 (CHIP); *see also* Letter from Daniel Tsai, Deputy Adm'r & Dir., Ctrs. for Medicare & Medicaid Servs., to Kate Massey, Mich. Med. Servs. Admin. (Sept. 15, 2021), [https://www.michigan.gov/documents/mdhhs/CMS\\_Approval\\_-\\_Flint\\_Waiver\\_3-3-16\\_516241\\_7.pdf](https://www.michigan.gov/documents/mdhhs/CMS_Approval_-_Flint_Waiver_3-3-16_516241_7.pdf) [<https://perma.cc/F7QR-SMM4>] (regarding the Section 1115 Demonstration); Letter from Brian Neale, Deputy Adm'r & Dir., Ctr. for Medicaid & CHIP Servs., to Jami Snyder, State Medicaid/CHIP Dir., Tex. Health & Hum. Servs. Comm'n (Aug. 31, 2017), <https://www.medicare.gov/sites/default/files/CHIP/Downloads/TX/TX-17-0043.pdf> [<https://perma.cc/3BHW-NP7J>] (granting CHIP waiver).

176. Letter from Seema Verma, Adm'r, Ctrs. for Medicare & Medicaid Servs., to Dr. Rafael Rodríguez Mercado, Sec'y of Health, Puerto Rico (Nov. 28, 2017), <https://www.medicare.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/pr/pr-disaster-relief-ca.pdf> [<https://perma.cc/M7AV-RSBS>].

177. 42 C.F.R. § 435.952(c)(3).

178. *Id.* § 435.403(j)(3) (Medicaid); *id.* § 457.320(e)(3)(i) (CHIP); *id.* § 431.52 (authorizing payments to out-of-state providers for Medicaid services); *see also* Letter from Dennis G. Smith, Dir., Ctr. for Medicaid & State Operations, to State Medicaid Dirs. & State Child.'s Health Ins. Program Dirs. (Sept. 16, 2005), <https://www.medicare.gov/Federal-Policy-Guidance/downloads/SHO-05-001.pdf> [<https://perma.cc/FT5P-9WNB>].

179. 42 U.S.C. § 5182.

disaster.<sup>180</sup> Lawyers can help with insurance claims and home repair contracts, draw up legal documents like wills that were lost in the disaster, and file appeals of FEMA decisions.<sup>181</sup> Unfortunately, the availability of legal services contemplated by the Stafford Act depends on volunteer attorneys. The ABA's Young Lawyers Division provides these services pro bono pursuant to an agreement with FEMA, and these volunteer lawyers refer fee-generating cases to local lawyers.<sup>182</sup> Accordingly, Congress does not offer sustained funding to disaster legal services.

What's more, state bars, by definition, restrict out-of-state lawyers from representing individuals in disaster-related matters. Following Katrina, the Louisiana State Bar Association adopted a temporary rule that allowed lawyers not admitted to that state's bar to provide pro bono services to people affected by Katrina so long as they worked through a non-profit legal aid organization (often referred to as the "Katrina Rule"). Since then, roughly twenty states and territories have adopted some version of this rule, and the ABA has endorsed a similar model rule.<sup>183</sup> After Sandy, New York adopted the ABA Model Rule.<sup>184</sup>

However, some states and territories have declined to adopt a Katrina Rule. The Florida Bar Association proposed a Katrina Rule in 2012, but the Florida Supreme Court rejected it.<sup>185</sup> California also declined to adopt a rule following the 2017 wildfires. Instead, the state relied on attorneys admitted to the California bar and trained through a state initiative to improve their disaster

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180. 44 C.F.R. § 206.164(a) (defining "low-income individuals" as "those disaster victims who have insufficient resources to secure adequate legal services, whether the insufficiency existed prior to or results from the major disaster"); *id.* § 206.164(e).

181. 42 U.S.C. § 5182; 44 C.F.R. § 206.164; *see also* DISASTER LEGAL SERVICES, *supra* note 19, at 1 (discussing limitations on legal practice).

182. 44 C.F.R. § 206.164(b) (mandating that these legal services "shall be provided free," but that "[f]ee-generating cases shall not be accepted by lawyers operating under these regulations"); FEMA-ABA MOU, *supra* note 20, at 4.

183. *Pro Bono and Disasters: Model Rule on Provision of Legal Services Following Determination of Major Disaster*, AM. BAR. ASS'N, [https://www.americanbar.org/groups/probono\\_public\\_service/policy/disasters/](https://www.americanbar.org/groups/probono_public_service/policy/disasters/) [<https://perma.cc/XZ3L-2SW3>]; Am. Bar Ass'n, Resolution Adopted by the House of Delegates Amending Comment [14] to Rule 5.5 of the Model Rules of Professional Conduct (Feb. 12, 2007), [https://www.americanbar.org/content/dam/aba/administrative/probono\\_public\\_service/as/hundredfour.pdf](https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/as/hundredfour.pdf) [<https://perma.cc/L2MZ-WDM8>]; MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 14 (Am. Bar Ass'n 2019).

184. RULES OF THE CT. OF APPEALS FOR THE ADMISSION OF ATT'YS & COUNS. AT L. § 520.11(d) (N.Y.) (laying out procedure for the "Provision of Legal Services Following Determination of Major Disaster"); *see also* STATE OF N.Y. CT. OF APPEALS, NOTICE TO THE BAR: DETERMINATION OF MAJOR DISASTER PURSUANT TO RULE 520.11(D) OF THE RULES OF THE COURT OF APPEALS (2012), <https://www.nycourts.gov/ctapps/news/nottobar/NottoBar111412.pdf> [<https://perma.cc/EQS9-VEVA>] (implementing rule after Sandy).

185. *In re* Amendments to the Rules Regulating the Florida Bar (Biannual Report), 101 So. 3d 807, 808 (Fla. 2012) (per curiam) (declining to adopt a rule that would "would allow lawyers from other jurisdictions to practice in Florida on a limited basis following a natural disaster").



response capabilities.<sup>186</sup> Puerto Rico also declined to adopt a Katrina Rule following Hurricane Maria.<sup>187</sup> The Texas bar has not adopted a Katrina Rule, but following Hurricane Harvey in 2017 and the winter storms in 2021, the Supreme Court of Texas promulgated temporary orders to allow out-of-state lawyers to practice for specified time periods.<sup>188</sup> The reasons for rejecting the Katrina Rule varied but often included confidence in the local bar's ability to meet the increased need for legal services following the disaster and skepticism that attorneys not familiar with the particular state or territory's laws could adequately assist residents.

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This overview of national programs demonstrates that the United States maintains various types of assistance to individuals after disasters. A few patterns emerge. Some programs, like D-SNAP and DUA, are extensions or expansions of existing programs. Others are disaster-specific, like FEMA's housing assistance. Some are simply temporary allowances or waivers, like Medicaid's relaxed enrollment procedures. Notably, the first two types of programs offer additional resources, whereas the third simply makes existing resources more accessible. These patterns will resurface in the rest of the Article. For now, it is important to remember that all of these programs require federal, state, and local coordination. Part IV returns to how the federal government could create a more streamlined and equitable structure for disaster food assistance through regulation. That Section will also explore what states, territories, and Tribes can do, in the absence of national lawmaking, to prepare for the next climate-induced catastrophe. Before we get there, though, we need a more sophisticated understanding of the flaws in how these programs reach people on the ground. Only then can we come to understand how the government could strengthen these programs in meaningfully adapting public benefits for the climate crisis.

### III.

#### WELFARE'S WEAKNESSES IN THE CLIMATE CRISIS

As Part II shows, in the wake of a climate-fueled disaster, the United States relies on state, territorial, and tribal governments to request and administer basic services. But just as a chain is only as strong as its weakest link, the American welfare state is only as responsive as its least responsive state. Furthermore, this default arrangement of cooperative federalism, by definition, disadvantages millions of Americans, including tribal members, residents of the territories, and

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186. See *About Us*, DISASTER LEGAL ASSISTANCE COLLABORATIVE, <https://disasterlegalservicesca.org/about-the-team/> [<https://perma.cc/76H9-9WLM>].

187. Bolado & Rodriguez, *supra* note 20 (describing concerns among Puerto Rican lawyers that the civil law provenance of that territory's law would be particularly challenging for other lawyers).

188. Emergency Order After Winter Storm Uri, *supra* note 20; Emergency Order After Hurricane Harvey, *supra* note 20.

immigrants. As a result, the federal government consistently struggles to deliver a forceful, coordinated response to disasters because it relies on states to implement and sometimes fund that response. As this Section will explain, these federalism arrangements make the American welfare state particularly vulnerable to the persistent and intensifying shocks of the climate crisis. Fortunately, though, the government's reliance on public benefits to combat the COVID-19 pandemic points to possible paths forward to strengthen these same programs for the climate crisis.

### A. *Congress in Extremis*

Before we see the weaknesses in relying on states and FEMA as first responders to these extreme weather events, we should consider how Congress acts as the backstop for funding basic assistance to U.S. citizens and residents in distress. As with other inquiries into the role of Congress, this Section explores whether Congress can still enact legislation and appropriate funds in a responsive and equitable manner during the climate crisis.

#### 1. *Diminished Congressional Capacity*

Political scientists have shown how Congress has become increasingly dysfunctional over the last twenty-five years, as a two-party electoral system fueled by partisan polarization fails to create a workable national legislature.<sup>189</sup> Now that the voting records of members of Congress often split along party lines, Congress cannot routinely reach the compromises necessary to act as a national legislature.<sup>190</sup>

In addition to the incompatibility of polarized electoral politics and supermajoritarian bicameralism, Congress has less lawmaking capacity.<sup>191</sup> Members of Congress spend fewer days in session than they used to.<sup>192</sup> When

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189. See generally THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012); Sarah A. Binder, *Legislating in Polarized Times*, in CONGRESS RECONSIDERED 189 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 11th ed. 2017).

190. Compare Frances E. Lee, *How Party Polarization Affects Governance*, 18 ANN. REV. POL. SCI. 261, 261 (2015) (contending that “[i]t is undeniable that the two parties have grown more sharply differentiated”), with GREGORY KOGER & MATTHEW J. LEBO, *Worst. Congress. Ever. Why?*, in STRATEGIC PARTY GOVERNMENT: WHY WINNING TRUMPS IDEOLOGY 3 (2017) (positing that in order to win elections, “legislators may unite behind strong party leaders even when they have diverse policy views”).

191. See Timothy M. LaPira, Lee Drutman & Kevin R. Kosar, *Overwhelmed: An Introduction to Congress's Capacity Problem*, in CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND PROSPECTS FOR REFORM 1, 1 (Timothy M. LaPira, Lee Drutman & Kevin R. Kosar eds., 2020) [hereinafter CONGRESS OVERWHELMED] (collecting research that suggested Congress lacks the “organizational resources, knowledge, expertise, time, space, and technology . . . to perform its constitutional role”).

192. See BIPARTISAN POL'Y CTR., *HOW CONGRESS GOVERNED IN A POLARIZED ERA: 2007–2018* 3 (2019) (detailing how “in recent years, Congress has kept a suboptimal work schedule in

they are on Capitol Hill, they spend more and more time fundraising.<sup>193</sup> Members of Congress routinely skip committee meetings,<sup>194</sup> and our congressional representatives have fewer people working for them than they did fifty years ago.<sup>195</sup>

Moreover, Congress lacks resources in comparison to the companies who lobby it. Corporations now spend more money lobbying Congress than taxpayers spend to fund the legislative branch.<sup>196</sup> Congress also loses its expertise to K Street. Hill staff routinely leave for more lucrative jobs in the lobbying industry,<sup>197</sup> and more than half of the members of Congress who left office after 2010 now lobby Congress.<sup>198</sup>

As Congress's capacity to function has waned, it has had to rely more on lobbyists and agencies to write legislation, and it expects agencies to fill in the gaps with regulations—effectively delegating more of its work to third parties.<sup>199</sup> And what happens in circumstances when Congress cannot delegate its

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Washington, which provided less time for legislating, reviewing federal programs, and fulfilling its most basic duty: funding the government")

193. See BIPARTISAN POL'Y CTR., *GOVERNING IN A POLARIZED AMERICA* 53 (2014), <https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/03/BPC-CPR-Report.pdf#page=54> [<https://perma.cc/G2W4-WJJ9>] ("From a practical standpoint, by traveling home every weekend and fundraising during most free moments while in session in Washington, members are insulated from personal contacts with those of the other party."); Lee Drutman, *Yet Another Retiring Member of Congress Complains About the Misery of Fundraising*, VOX (Jan. 8, 2016), <https://www.vox.com/polyarchy/2016/1/8/10736402/congress-fundraising-miserable> [<https://perma.cc/SR9U-LK35>]; Planet Money, *Welcome to Congress. Now Start Calling Strangers to Ask for Money*, NPR (Jan. 9, 2013), <https://www.npr.org/sections/money/2013/01/09/168958774/welcome-to-congress-now-start-calling-strangers-to-ask-for-money> [<https://perma.cc/K829-NUJ3>] (reporting on a PowerPoint slide used by the Democratic Congressional Campaign Committee to incoming freshman urging them to spend four hours on "call time" every day they are in Washington).

194. Luke Rosiak, *Many House Members Miss More Than Two-Thirds of Their Committee Meetings*, WASH. EXAMINER (Sept. 29, 2014), <https://www.washingtonexaminer.com/many-house-members-miss-more-than-two-thirds-of-their-committee-meetings> [<https://perma.cc/3575-9UNR>].

195. Molly E. Reynolds, *The Decline in Congressional Capacity*, in CONGRESS OVERWHELMED, *supra* note 191, at 34, 36.

196. See Ezra Klein, *Corporations Now Spend More Lobbying Congress than Taxpayers Spend Funding Congress*, VOX (July 15, 2015), <https://www.vox.com/2015/4/20/8455235/congress-lobbying-money-statistic> [<https://perma.cc/Q7DC-JNS5>].

197. Joshua McCrain, *Revolving Door Lobbyists and the Value of Congressional Staff Connections*, 80 J. POL. 1369, 1369 (2018) (observing that "[a] fact of life in Washington, DC, is the regular transition of Capitol Hill staffers into high-paying lobbying jobs on K Street . . .").

198. See *Revolving Door: Former Members of the 111th Congress*, OPENSECRETS, <http://www.opensecrets.org/revolving/departing.php?cong=111> [<https://perma.cc/47BL-KJ5Y>]; Jeffrey Lazarus, Amy McKay & Lindsey Herbel, *Who Walks Through the Revolving Door? Examining the Lobbying Activity of Former Members of Congress*, 5 INT. GRPS. & ADVOC. 82, 90 (2016) (stating that 51.6 percent of former 111th members of Congress either joined lobbying firms, became lobbying clients, or joined a PAC).

199. See Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1938–46 (2020); Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1383, 1387–97 (2017).

authority? At best, Congress relies on unorthodox lawmaking.<sup>200</sup> At worst, the federal government shuts down.<sup>201</sup> There were four government shutdowns in the 1980s, but none lasted more than a day. The last two—beginning in October 2013 and December 2018, respectively—combined to last fifty days.<sup>202</sup> While the budget and appropriations process has been a site of unorthodox lawmaking for some time, in the words of Gillian Metzger, “the gap between the ideal and the real has grown much larger of late.”<sup>203</sup> While Congress enacted a budget resolution every year from 1975 to 1998, it has failed to do so seven times in the last ten years.<sup>204</sup> These realities of national lawmaking in the United States risk making Congress increasingly unresponsive precisely when the people it purports to represent will need immediate and drastic action as the planet becomes more and more hostile to human life. Already we can see ways in which Congress’s current state has impeded disaster relief.

## 2. *Congress and Emergency Appropriations*

Congress’s dysfunctionality, a product of its partisan polarization and eroded capacity, can impact the degree to which it is a responsive institution—meaning its “ability to prioritize and call attention to public problems.”<sup>205</sup> This responsiveness includes its ability to put issues on the agenda and keep others off.<sup>206</sup> One type of congressional responsiveness is the extent to which our national legislature is able to appropriate funds for various federal efforts. Looking at recent disaster relief efforts as a proxy for whether Congress will be capable of adapting welfare programs, Capitol Hill has a mixed record.

Congress has consistently appropriated emergency funds for disaster relief since the Civil War.<sup>207</sup> In the past, Congress made disaster appropriations

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200. See BARBARA SINCLAIR, UNORTHODOX LAWMAKING xiii (5th ed. 2016) (defining “unorthodox lawmaking” as procedures that differ from “textbook” lawmaking models).

201. See David Scott Louk & David Gamage, *Preventing Government Shutdowns: Designing Default Rules for Budgets*, 86 U. COLO. L. REV. 181, 220–24 (2015) (discussing the 2013 shutdown).

202. See CONG. BUDGET OFF., THE EFFECTS OF THE PARTIAL SHUTDOWN ENDING IN JANUARY 2019 4–6 (Jan. 28, 2019), <https://www.cbo.gov/system/files/2019-01/54937-PartialShutdownEffects.pdf> [<https://perma.cc/JTV4-8AKF>]; Zaveri, Gates & Zraick, *supra* note 21.

203. Gillian Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1092 (2021).

204. *Id.*

205. See Lee Drutman & Timothy M. Lapira, *Capacity for What? Legislative Capacity Regimes in Congress and Possibilities of Reform*, in CONGRESS OVERWHELMED, *supra* note 191, at 14, 14–15 (defining “a responsive legislature” as one that “calls forth and attends to the most important public problems, prioritizing in a way that reflects the significance and urgency of the issues at hand”).

206. For the political science literature on democratic responsiveness and agenda setting, see, e.g., GARY W. COX & MATTHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES (2005); JOHN W. KINGDON, AGENDAS, ALTERNATIVES AND PUBLIC POLICIES (1984).

207. See DAUBER, *supra* note 23, at 25 (describing how “[b]etween 1860 and 1930” Congress passed “more than ninety separate relief measures for various fires, floods, droughts, and famines”); PATRICK S. ROBERTS, DISASTERS AND THE AMERICAN STATE: HOW POLITICIANS, BUREAUCRATS, AND THE PUBLIC PREPARE FOR THE UNEXPECTED 16–40 (2013) (discussing origins of federal response to disasters).

without offsetting those funds with budget cuts elsewhere.<sup>208</sup> Following the 2010 midterm elections, congressional Republicans began insisting on budget offsets for any disaster relief appropriations.<sup>209</sup> This new climate for disaster relief on Capitol Hill explains in part why, in 2013, following Superstorm Sandy, Congress took so long to pass an appropriations bill for the affected areas.<sup>210</sup> Congress's response time for an emergency appropriation after the September 11th terrorist attacks was seven days. For Hurricane Katrina, Congress took ten days. For Superstorm Sandy, Congress took ninety-one.<sup>211</sup> This new insistence on budget offsets also helps explain the long delay in enacting an emergency appropriation to address the water crisis in Flint, Michigan. The Senate passed such an appropriation unanimously in May 2015, but the House stalled for over eighteen months.<sup>212</sup>

Congress's inability to enact disaster relief in 2018 may also prove prophetic. In early September 2017, Congress made initial disaster appropriations to Florida, Puerto Rico, Texas, and the U.S. Virgin Islands to aid recovery efforts following multiple storms.<sup>213</sup> Hurricane Maria then struck Puerto Rico on September 20, 2017. Maria, the strongest storm to ever hit Puerto Rico, knocked out the island's power grid. Congress made another appropriation of supplemental funding in February 2018 to address damage caused by disasters in the previous year.<sup>214</sup> The widespread devastation and humanitarian crisis in Puerto Rico prompted many members of Congress to support additional

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208. Carl Hulse, *Federal Austerity Changes Disaster Relief*, N.Y. TIMES (Aug. 30, 2011), <https://www.nytimes.com/2011/08/31/us/politics/31disaster.html> [<https://perma.cc/A3W5-ZF5L>].

209. *Id.*; see also Gregory W. Meeks, *A Storm in Congress: How Partisanship Impacts Disaster Response*, 53 HARV. J. LEGIS. 447, 449–51 (2016) (identifying the new Republican House majority in the 112th Congress as changing the politics of disaster relief on Capitol Hill); Raymond Hernandez, *Congress Approves \$51 Billion in Aid for Hurricane Victims*, N.Y. TIMES (Jan. 28, 2013), <https://www.nytimes.com/2013/01/29/nyregion/congress-gives-final-approval-to-hurricane-sandy-aid.html> [<https://perma.cc/FG37-JS2S>] (discussing how fiscal conservatives obstructed Sandy relief in the House as part of larger deficit fights). To be sure, as climate disasters become more common, such relief becomes more regular, making it feel more like normal budget appropriations rather than one-off major spending.

210. See Disaster Relief Appropriations Act of 2013, Pub. L. No. 113-2, 127 Stat. 4 (2013); see also Danshera Wetherington Cords, *An Inflection Point for Disaster Relief: Superstorm Sandy*, 35 TOUROL. REV. 925, 946 (2019) (arguing that that delay “marked a severe shift in Congressional funding for disaster relief”).

211. Cords, *supra* note 210, at 946; Meeks, *supra* note 209, at 450.

212. Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, 130 Stat. 1628 (2016); see Susan Milligan, *Playing Games with a Disaster*, U.S. NEWS (Sept. 30, 2016), <https://www.usnews.com/news/articles/2016-09-30/the-partisan-politics-of-disaster-relief> [<https://perma.cc/S4UG-WVR4>] (describing the partisan nature of disaster relief to address the Flint, MI water crisis).

213. See Continuing Appropriations Act of 2018 and Supplemental Appropriations for Disaster Relief Requirements Act of 2017, Pub. L. No. 115-56, div. B, 131 Stat. 1129, 1137; see also Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 100–02 (2021) (discussing the shutdown and in particular its impact on funding for tribal programs).

214. See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 21101, 132 Stat. 64, 103.

appropriations for Puerto Rico in 2018, but the legislation went nowhere for months.<sup>215</sup>

Meanwhile, the climate-fueled disasters kept on coming. Hurricane Michael, the first Category 5 hurricane to hit the United States in twenty-five years and the fourth-strongest hurricane to hit the country ever, struck Florida, causing an estimated \$25 billion in damage.<sup>216</sup> On the other side of the country, California endured, according to the state's forestry agency, the "deadliest and most destructive wildfire season on record."<sup>217</sup> In 2018, 7,500 fires burned in an area of over 1.67 million acres in California. Among them, the Camp Fire on November 8, 2018, killed more people than any other in the state's history.<sup>218</sup>

Then on December 22, 2018, President Trump and Congress's disputes led to the federal government shutdown.<sup>219</sup> Lasting thirty-five days, it was the longest in U.S. history. When the government reopened, it still took another four months for the 2018 disaster appropriations to become law.<sup>220</sup> The fight over additional funding for Puerto Rico ensnared emergency appropriations for California and Florida, as well as Iowa, which endured historic floods.<sup>221</sup> In the end, Iowa waited two months, California waited a few more, Florida waited nearly eight, and Puerto Rico waited over a year for Congress to act.<sup>222</sup> As then-Senate Majority Leader Mitch McConnell put it, "I believe I'm correct that this has taken longer than after any previous disaster to address the problem."<sup>223</sup>

Perhaps this combination of partisan polarization, congressional inaction, and a government shutdown stretching for weeks was an aberration. The extreme weather that created the devastation was not. Congress will be tested more frequently in the coming years to provide disaster relief in a timely manner to reach people in need. It seems likely that the saga of disaster relief in 2018 and 2019 is a harbinger of things to come.

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215. See Charley E. Willison, Phillip M. Singer, Melissa S. Creary & Scott L. Greer, *Quantifying Inequities in U.S. Federal Response to Hurricane Disaster in Texas and Florida Compared with Puerto Rico*, 4 *BMJ GLOB. HEALTH*, no. 1, 2019, at 2–4; Brynne Keith-Jennings, *Puerto Rico Forced to Slash Basic Food Aid While Waiting for Washington to Act*, *CTR. ON BUDGET & POL'Y PRIORITIES* (Mar. 6, 2019), <https://www.cbpp.org/blog/puerto-rico-forced-to-slash-basic-food-aid-while-waiting-for-washington-to-act> [<https://perma.cc/47MY-5MAE>]; see also Lawrence, *supra* note 213, at 117–20 (discussing impact on Puerto Rico).

216. *Assessing the U.S. Climate in 2018*, *NAT'L OCEANIC & ATMOSPHERIC ADMIN.* (Feb. 6, 2019), <https://www.ncei.noaa.gov/news/national-climate-201812> [<https://perma.cc/UFF4-A5NB>].

217. *2018 Incident Archive*, *CAL. DEP'T OF FORESTRY & FIRE PROT.*, <https://www.fire.ca.gov/incidents/2018/> [<https://perma.cc/7XXJ-28RW>].

218. *Id.*; *New Timeline of Deadliest California Wildfire Could Guide Lifesaving Research and Action*, *NAT'L INST. OF STANDARDS & TECH.* (Feb. 8, 2021), <https://www.nist.gov/news-events/news/2021/02/new-timeline-deadliest-california-wildfire-could-guide-lifesaving-research> [<https://perma.cc/UXS9-PDM8>].

219. See ROSENBAUM, *supra* note 21 (describing the stalling of the Senate majority in voting on an appropriations bill passed by the House).

220. Zaveri, Gates & Zraick, *supra* note 21.

221. See Cochrane & Thrush, *supra* note 21; Levine, *supra* note 21.

222. Sen. Marco Rubio Press Release, *supra* note 21; see Zhou, *supra* note 21.

223. Caldwell & Thorp, *supra* note 21.

### B. *Delays and Disparities in Distributing Relief*

Disparate disaster welfare programs and congressional dysfunction means that federal agencies and state, territorial, and tribal governments must wait for funding, but then have a fair amount of flexibility in making these public benefits available. However, there are weaknesses and drawbacks in the government response. It is undoubtedly difficult to administer governmental programs that were not available to residents in an impacted area before a storm but are suddenly critical to their survival. These surges in need can easily overwhelm state and local bureaucracies tasked with distributing assistance.<sup>224</sup> Nonetheless, this Section documents how disaster welfare assistance is often delayed and improperly distributed. Moreover, these programs often fail to accommodate the elderly and people with disabilities, and racial disparities persist in terms of access and generosity.

#### 1. *Delays in Distributing Relief*

As discussed above, assistance to individuals following extreme weather events can sometimes be delayed on Capitol Hill—the 2018 disaster appropriations being the most recent egregious example. But delays occur at the state level, too. Delays in disaster food assistance are instructive. For instance, after Hurricane Harvey in 2017, Texas immediately distributed replacement food assistance to more than 800,000 households already receiving SNAP,<sup>225</sup> but Texas waited weeks to implement D-SNAP anywhere in the state.<sup>226</sup> When state officials did implement D-SNAP, they initially excluded the cities of Corpus Christi and Houston because of the “large volumes of people who would not be able to be efficiently served through a local [welfare] office.”<sup>227</sup> As a result, Texas closed D-SNAP eligibility in some parts of the state before it had opened D-SNAP eligibility in others.<sup>228</sup> New Jersey did not launch its D-SNAP program until nearly three weeks after Sandy.<sup>229</sup> Even though New York implemented D-SNAP quicker than New Jersey did, some of New York City’s offices remained

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224. Super, *supra* note 21, at 1442–44 (discussing this phenomenon with Hurricane Katrina).

225. See Press Release, Tex. Health & Hum. Servs. Comm’n, *supra* note 21; FOOD RSCH. & ACTION CTR., *SNAP Monthly Participation Increases*, *supra* note 21 (“In Texas, SNAP participation increased in September 2017 by 809,109 persons, as Hurricane Harvey hit Houston and other areas hard.”).

226. Collins, *supra* note 21 (“It’s unknown why Texas hasn’t launched the emergency program yet.”).

227. Press Release, Off. of the Tex. Governor, Texas Expands Food Benefits for Harvey Victims (Sept. 11, 2017), <https://gov.texas.gov/news/post/texas-expands-food-benefits-for-harvey-victims> [<https://perma.cc/8FZF-DNTE>].

228. See TEX. HEALTH & HUM. SERVS. COMM’N, *DISASTER FOOD BENEFITS: KEY POINTS 2–3* (2017), <https://www.hhs.texas.gov/sites/default/files/documents/services/financial/d-snap-key-points.pdf> [<https://perma.cc/7SSM-UHF6>] (listing dates available by county); GOVERNOR’S COMM’N TO REBUILD TEX., *EYE OF THE STORM: REPORT OF THE GOVERNOR’S COMMISSION TO REBUILD TEXAS 74–75* (2018), <https://www.rebuildtexas.today/wp-content/uploads/sites/52/2018/12/11-18-EYE-OF-THE-STORM-digital.pdf> [<https://perma.cc/2SSF-T4SK>].

229. Collins, *supra* note 21.

closed because of storm damage and were thus unable to distribute the benefits.<sup>230</sup> Following the fires that struck California that same fall, the state reported that D-SNAP assistance only became available after many of the state's disaster centers were beginning to close.<sup>231</sup>

The problem of finding physical infrastructure to distribute assistance raises other challenges for state, territorial, and tribal governments. After Harvey and Irma, Florida and Texas experienced significant difficulties as individuals tried to apply for D-SNAP in person.<sup>232</sup> In Texas, people reportedly waited in line for seven or eight hours to apply for benefits.<sup>233</sup> Meanwhile, 50,000 people lined up at a park in Miami on a single day to receive emergency food assistance.<sup>234</sup> At another D-SNAP site in Florida, so many people in line collapsed from heat exhaustion that police had to shut down the site.<sup>235</sup> These failures are emblematic of a federal regulatory regime that relies on federal and state agencies to construct a benefit access system essentially overnight and precisely when those institutions have experienced widespread destruction.

## 2. *Disparities in Distributing Relief*

These cooperative federalism arrangements also create disparities when state and local agencies distribute assistance. Considering federal law requires that individuals apply for D-SNAP assistance in person, it necessarily excludes those people with limited mobility. As a result, senior citizens and people with disabilities routinely miss out on emergency assistance. Unsurprisingly, there has been a spate of lawsuits against federal and state agencies for administering these post-disaster public benefits in ways that discriminate against and fail to accommodate people with disabilities.<sup>236</sup>

Take, for instance, two lawsuits involving D-SNAP. Poor New Yorkers with disabilities alleged that New York State's and New York City's agencies violated federal and state law in administering D-SNAP over a seven-day period following Sandy.<sup>237</sup> Specifically, the plaintiffs alleged that the state and local

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230. Alice Hines, *After Sandy, NYC Food Stamp Centers Crowded with Hungry Families*, HUFFINGTON POST (Nov. 5, 2012), [https://www.huffpost.com/entry/sandy-food-stamp-centers-nyc\\_n\\_2078862](https://www.huffpost.com/entry/sandy-food-stamp-centers-nyc_n_2078862) [<https://perma.cc/DY7U-FWKQ>].

231. *CalFresh Fights Hunger in the Face of California Wildfires*, FOOD RSCH. & ACTION CTR. (Dec. 2017), <https://frac.org/blog/calfresh-fights-hunger-face-california-wildfires>. [<https://perma.cc/DSM8-Z28R>].

232. See Collins, *supra* note 21.

233. GOVERNOR'S COMM'N TO REBUILD TEX., *supra* note 228, at 74.

234. Garvin, *supra* note 14.

235. Madan, *supra* note 15.

236. See generally *Disaster Preparedness and Response: The Special Needs of Older Americans: Hearing Before the S. Special Comm. on Aging*, 115th Cong. (2017) (including testimony from Dr. Kathryn Hyer, Professor & Dir., Fla. Pol'y Exch. Ctr. on Aging, Sch. of Aging Stud., Univ. of S. Fla., highlighting the need for litigation protection for disaster response facilities).

237. See Complaint, *Toney-Dick v. Doar*, *supra* note 16, ¶¶ 1–2 (alleging violations of the Americans with Disabilities Act, the Rehabilitation Act, the Food and Nutrition Act, and state and local law).



agencies failed to provide reasonable accommodations for individuals with disabilities.<sup>238</sup> New York decided to only allow in-person applications at one full-time site in Brooklyn and one part-time satellite site on Staten Island.<sup>239</sup> Floridians brought a similar lawsuit following Hurricane Irma in 2017.<sup>240</sup> The day after the state was sued, Florida’s Department of Children and Families asked the U.S. Department of Agriculture to waive its in-person D-SNAP interview requirement so that elderly applicants and applicants with disabilities who had pre-registered with the state agency could apply over the phone.<sup>241</sup> The federal government granted that waiver—the first of its kind—two weeks later.<sup>242</sup>

While these lawsuits largely involve disaster food assistance, there is a reason why there are fewer lawsuits involving FEMA. FEMA claims that it cannot be sued for any violation related to its distribution of benefits under the Stafford Act.<sup>243</sup> Section 701(a) of the Administrative Procedure Act prohibits judicial review where “agency action is committed to agency discretion by law.”<sup>244</sup> In various lawsuits, FEMA has argued that its actions are discretionary and therefore the agency is immune from suit when it distributes benefits after a disaster, a defense that federal courts routinely accept.<sup>245</sup>

While HHS and FEMA must comply with federal nondiscrimination statutes, which include the requirement to ensure access to their programs to persons with limited English proficiency, federal law prohibits some immigrants from accessing some of these programs.<sup>246</sup> Only U.S. citizens and immigrants with certain legal statuses, such as Lawful Permanent Residents, can receive

238. *Id.* ¶¶ 1–2, 19; *see also* Complaint ¶¶ 88–89, *Rafferty v. Doar*, No. 13-cv-1410, 2013 WL 3328168 (S.D.N.Y. Mar. 5, 2013) (class action complaint).

239. *See* Complaint, *Toney-Dick v. Doar*, *supra* note 16, ¶¶ 19, 58.

240. *See* *Mia. Workers Ctr. v. Carroll*, No. 17-cv-24047 (S.D. Fla. Nov. 2, 2017).

241. *See* Letter from Liesta Sykes, Dir. of Econ. Self-Sufficiency, Fla. Dep’t of Child. & Fams., to Peggy Fouts, Regional Dir., Supplemental Nutrition Assistance Program (Nov. 3, 2017), <https://www.myflfamilies.com/newsroom/docs/SupplementalNutritionAssistanceProgram-11.03.17.pdf> [<https://perma.cc/D3JP-GZZ6>].

242. Press Release, Fla. Dep’t of Child. & Fams., DCF, USDA to Administer Telephone Interviews for Special Needs Applicants Unable to Previously Interview for D-SNAP (Nov. 17, 2017), <https://www.myflfamilies.com/newsroom/pressreleases/2017/20171117-DCF,%20USDA%20to%20Administer%20Telephone%20Interviews%20for%20Special%20Needs%20Applicants%20Unable%20to%20Previously%20Interview%20for%20DSNAP.shtml> [<https://perma.cc/8ZFG-E9PJ>].

243. *See In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 289–91 (5th Cir. 2012) (affirming the district court’s dismissal of FTCA claims). *See generally* John K. Pierre & Gail S. Stephenson, *After Katrina: A Critical Look at FEMA’s Failure to Provide Housing for Victims of Natural Disasters*, 68 LA. L. REV. 443, 478–82 (2008) (discussing challenges of suing FEMA).

244. 5 U.S.C. § 701(a)(2).

245. *See, e.g.*, *Ridgely v. FEMA*, 512 F.3d 727 (5th Cir. 2008); *Santos v. FEMA*, 327 F. Supp. 3d 328 (D. Mass. 2018); *McWaters v. FEMA*, 436 F. Supp. 2d 802 (E.D. La. 2006). *But see* *Ass’n of Cmty. Orgs. for Reform Now v. FEMA*, 463 F. Supp. 2d 26, 34 (D.D.C. 2006) (holding that the evacuees had “a protectable property right in the housing assistance administered by FEMA, which cannot be deprived without due process of law”).

246. *See* 42 U.S.C. § 18116; 45 C.F.R. § 92.101.

assistance through FEMA’s IHP.<sup>247</sup> These restrictions mirror other prohibitions on serving immigrant families through public benefits.<sup>248</sup> As a result, since many households in the United States are mixed-status, meaning citizen children are living with parents who are not “qualified aliens,” those children who are, in fact, eligible for assistance do not receive it because of their parents’ fear and distrust of government.<sup>249</sup>

Moreover, federal and state agencies sometimes distribute disaster aid in racially disparate ways. Researchers have found evidence of racial disparities in how FEMA administers IHP benefits.<sup>250</sup> Some Texans alleged that FEMA’s high denial rates of housing repair applications in the Rio Grande Valley reflect long-standing racist practices regarding colonias—communities along the border that have repeatedly been excluded from infrastructure investment.<sup>251</sup> Researchers have also found that FEMA’s grants in Houston following Hurricane Harvey disproportionately benefited the wealthy.<sup>252</sup>

Thus, current federal and state processes for using public benefits to respond to disasters exhibit significant flaws including delayed appropriations, improper distribution, persistent barriers to access, and racial disparities. Fortunately, some of these flaws in the status quo can be fixed. Before explaining how to do that, it is worth reflecting on what lessons the federal government’s

247. See *Citizenship and Immigration Status Requirements for Federal Public Benefits*, FED. EMERGENCY MGMT. AGENCY (Oct. 11, 2022), <https://www.fema.gov/assistance/individual/program/citizenship-immigration-status> [https://perma.cc/G5JA-Z2EW].

248. The Personal Responsibility and Work Opportunity Reconciliation Act restricted access to Medicaid, SNAP, SSI, and TANF to U.S. citizens and “qualified aliens.” Subsequent Congresses restored some immigrant eligibility, but millions of immigrants continue to be excluded from basic assistance. See ELISA MINOFF, ISABELLA CAMACHO-CRAFT, VALERY MARTÍNEZ & INDIVAR DUTTA-GUPTA, CTR. FOR THE STUDY OF SOC. POL’Y, *THE LASTING LEGACY OF EXCLUSION 16–17* (2021), <https://cssp.org/wp-content/uploads/2021/08/Lasting-Legacy-of-Exclusion-FINAL-ACCESSIBLE.pdf> [https://perma.cc/NG6H-RPC9].

249. *Id.*; see also Abby Goodnough & Margot Sanger-Katz, *Medicaid Covers a Million Fewer Children. Baby Elijah Was One of Them*, N.Y. TIMES (Oct. 25, 2019), <https://www.nytimes.com/2019/10/22/upshot/medicaid-uninsured-children.html> [https://perma.cc/FLY7-J4PN].

250. See, e.g., Simone J. Domingue & Christopher T. Emrich, *Social Vulnerability and Procedural Equity: Exploring the Distribution of Disaster Aid Across Counties in the United States*, 49 AM. REV. PUB. ADMIN. 897, 908 (2019); Junia Howell & James R. Elliot, *Damages Done: The Longitudinal Impacts of Natural Hazards on Wealth Inequality in the United States*, 66 SOC. PROBS. 448 (2018).

251. See *La Union del Pueblo Entero v. FEMA*, 141 F. Supp. 3d 681 (S.D. Tex. 2015); see also Carolina Cuellar, *Colonias Bear the Heaviest Burden When Rain Falls in the Rio Grande Valley*, TEX. PUB. RADIO (July 22, 2021), <https://www.tpr.org/border-immigration/2021-07-22/colonias-bear-the-heaviest-burden-when-rain-falls-in-the-rio-grande-valley> [https://perma.cc/CJW6-7B3E] (discussing case).

252. Stephen B. Billings, Emily A. Gallagher & Lowell Ricketts, *Let the Rich Be Flooded: The Distribution of Financial Aid and Distress After Hurricane Harvey*, 146 J. FIN. ECON. 797, 817 (2022) (presenting evidence that “disaster assistance programs—both SBA loans and, more surprisingly, FEMA IHP grants—are regressive in allocation”); see also Dana, *supra* note 6, at 81 (discussing how many FEMA programs “operate to support wealthy residential and commercial owners”).

response to the COVID-19 pandemic offers for climate adaptation of public benefits.

### C. *Lessons from the COVID-19 Response*

The United States has endured some of the worst infection and mortality rates during the global COVID-19 pandemic,<sup>253</sup> and some experts have suggested that a lack of consistent leadership at both the national and state level exacerbated the pandemic.<sup>254</sup> This Section does not weigh in on that debate. Rather, it focuses on how the use of public benefits in the government's pandemic response might inform future government responses to the climate crisis.

In some ways, the federal government's response to the COVID-19 pandemic tracked its response to the climate-fueled disasters discussed above. In response to the pandemic, President Trump granted major disaster declaration requests for all fifty states, the District of Columbia, and the five territories.<sup>255</sup> It was the first time the Stafford Act was used to declare a public health disaster. And just as federal law deploys public benefits as disaster relief, the federal government similarly relied on these programs during the COVID-19 pandemic.

How the federal and state governments responded to the COVID-19 pandemic using public benefits deserves (and, in some ways, has already gotten) its own lengthy analysis.<sup>256</sup> However, for the purposes of thinking through how the United States should adapt its welfare programs to meet the climate crisis, this Section elaborates on three interlocking lessons from the pandemic. First, the federal government will rely on existing programs to deliver immediate assistance. Second, as a result, the response will reinforce the racial hierarchy that structures the U.S. welfare state. Third and finally, lawmakers, and perhaps voters, seem more willing to consider universal or quasi-universal cash benefits—which, in turn, can, but do not always, avoid the racialized pitfalls of preexisting programs.<sup>257</sup>

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253. See COVID-19 DASHBOARD BY THE CENTER FOR SYSTEMS SCIENCE AND ENGINEERING (CSSE), JOHNS HOPKINS UNIV., <https://coronavirus.jhu.edu/map.html> [<https://perma.cc/AX8Z-Y9Z6>]; German Lopez, *How the US's Covid-19 Death Toll Compares to That of Other Wealthy Countries*, VOX (Jan. 11, 2021), <https://www.vox.com/future-perfect/2021/1/11/22220827/covid-19-pandemic-coronavirus-usa-europe-canada-trump> [<https://perma.cc/HGD3-KDYY>].

254. See, e.g., *The U.S. is Missing Key Opportunities to End the COVID-19 Pandemic*, COMMONWEALTH FUND (Jan. 15, 2021), <https://www.commonwealthfund.org/publications/podcast/2021/jan/us-is-missing-key-opportunities-end-covid-19-pandemic> [<https://perma.cc/VM7L-RF4T>]; The Editors, *Dying in a Leadership Vacuum*, 383 NEW ENG. J. MED. 1479, 1480 (2020).

255. *COVID-19 Disaster Declarations*, FED. EMERGENCY MGMT. AGENCY (Aug. 20, 2021), <https://www.fema.gov/disasters/coronavirus/disaster-declarations> [<https://perma.cc/Y7PD-D5WS>].

256. See, e.g., Hammond, Kleiman & Scheffler, *supra* note 31.

257. See Alex Rees-Jones, John D'Attoma, Amedeo Piolatto & Luca Salvadori, *COVID-19 Changed Tastes for Safety-Net Programs* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27865, 2020), [https://www.nber.org/system/files/working\\_papers/w27865/w27865.pdf](https://www.nber.org/system/files/working_papers/w27865/w27865.pdf) [<https://perma.cc/DK67-UGYJ>].

### 1. *Reliance on Existing Programs*

The federal response to the COVID-19 pandemic was vast, variable, and arguably inadequate. Yet, despite the wide-ranging set of policies and programs, the federal government relied heavily on existing programs to deliver assistance to Americans struggling with illness, unemployment, food and housing insecurity, and care responsibilities.<sup>258</sup> A look at how the federal government relied on existing food, unemployment, and means-tested health insurance shows the path dependency of the pandemic response.

#### a. *Food Assistance*

Before COVID-19 spread throughout the United States, over thirty-seven million Americans received SNAP benefits.<sup>259</sup> However, more Americans found it harder to afford food during the pandemic, in part because of the widespread closures to limit the virus's spread. For instance, more Americans used food pantries and other charitable organizations for food assistance in early 2020 than at any time since at least 2014.<sup>260</sup> Even if the federal government had made no changes to SNAP, use of the program would have surged, as it has in past crises.<sup>261</sup> That's because SNAP is an automatic stabilizer—it covers more people and provides more assistance during economic downturns, and it contracts as the economy recovers.<sup>262</sup> But Congress accelerated and amplified SNAP's impact by allowing states to make “emergency allotments” for SNAP households, thereby permitting states to give the maximum benefit to more households.<sup>263</sup>

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258. See, e.g., DIANE SCHANZENBACH & ABIGAIL PITTS, NW. UNIV. INST. FOR POL'Y RSCH., HOW MUCH HAS FOOD INSECURITY RISEN? EVIDENCE FROM THE CENSUS HOUSEHOLD PULSE SURVEY 3 (2020), <https://www.ipr.northwestern.edu/documents/reports/ipr-rapid-research-reports-pulse-hh-data-10-june-2020.pdf> [<https://perma.cc/5ML9-QFU9>]; Lauren Bauer, *The COVID-19 Crisis Has Already Left Too Many Children Hungry in America*, BROOKINGS INST. (May 6, 2020), <https://www.brookings.edu/blog/up-front/2020/05/06/the-covid-19-crisis-has-already-left-too-many-children-hungry-in-america/> [<https://perma.cc/E3D9-Z3QJ>].

259. FOOD & NUTRITION SERV., SNAP: FY19 THROUGH FY22 NATIONAL VIEW SUMMARY (2021), <https://fns-prod.azureedge.us/sites/default/files/resource-files/34SNAPmonthly-10.pdf> [<https://perma.cc/BGW8-RYZT>].

260. See Marianne Bitler, Hilary W. Hoynes & Diane Whitmore Schanzenbach, *The Social Safety Net in the Wake of COVID-19* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27796, 2020), [https://www.nber.org/system/files/working\\_papers/w27796/w27796.pdf](https://www.nber.org/system/files/working_papers/w27796/w27796.pdf) [<https://perma.cc/6N8X-WKAR>].

261. James P. Ziliak, *Why Are So Many Americans on Food Stamps? The Role of the Economy, Policy, and Demographics*, in SNAP MATTERS: HOW FOOD STAMPS AFFECT HEALTH AND WELL BEING 18, 18–19 (Judith Bartfeld, Craig Gundersen, Timothy M. Smeeding & James P. Ziliak eds., 2016) (discussing reasons for SNAP's ubiquity).

262. Robert A. Moffitt & James P. Ziliak, *COVID-19 and the U.S. Safety Net*, 41 FISCAL STUD. 515, 544 (2020) (concluding that unlike other U.S. anti-poverty programs, “SNAP has functioned well overall as an automatic stabilizer”); see also Ariel Jurow Kleiman, Gabriel Scheffler & Andrew Hammond, *Legislating a More Responsive Safety Net*, in COVID-19 AND THE LAW: DISRUPTION, IMPACT AND LEGACY (I. Glenn Cohen, Abbe R. Gluck, Katherine Kraschel & Carmel Shachar eds., forthcoming 2024) (making the case for automatic stabilizers).

263. Families First Coronavirus Response Act, Pub. L. No. 116-127, § 2302(a)(1), 134 Stat. 178, 188 (2020); see also Memorandum from Jessica Shahin, Assoc. Adm'r, SNAP & Kristen Hyatt, Acting

Congress also suspended all SNAP work requirements for the duration of the emergency declaration, provided more funding to states for the administrative costs in light of the surge in need, and made additional appropriations to other nutrition programs.<sup>264</sup>

Congress did create a new food assistance program in response to the pandemic, but that new program was built on SNAP. Congress authorized the U.S. Department of Agriculture to allow states to create a “Pandemic EBT” (P-EBT) program.<sup>265</sup> This food assistance provided families with an amount equal to the school meals missed from school closures.<sup>266</sup> Roughly thirty million children receive free or reduced-price meals at school.<sup>267</sup> P-EBT allowed participating states “to provide approximately \$250 to \$450 per child in grocery benefits (depending on the average number of days schools closed in the state) to make up for the meals missed in the spring of 2020.”<sup>268</sup> The states loaded these new benefits onto EBT cards (the same technology used for SNAP). Initially, all fifty states, the District of Columbia, and the U.S. Virgin Islands participated in P-EBT. Congress extended P-EBT benefits three times so assistance could continue through summer 2021.<sup>269</sup>

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Deputy Adm’r, Child Nutrition Programs, to SNAP State Agencies & Child Nutrition State Agencies (Mar. 20, 2020), <https://fns-prod.azureedge.net/sites/default/files/resource-files/SNAP-COVID-EmergencyAllotmentsGuidance.pdf> [<https://perma.cc/65H8-S9QG>].

264. Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 1102, 2301(a), 2302(a)(1), 134 Stat. 178, 180, 187–88 (2020); American Rescue Plan Act of 2021, Pub. L. No. 117-2, §§ 1101(b), 1103, 135 Stat. 4, 15 (2021); Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong. § 704 (2021).

265. Families First Coronavirus Response Act, Pub. L. No. 116-127, § 1101(b)–(i), 134 Stat. 178, 179–80 (2020). By late August 2020, the U.S. Department of Agriculture had approved P-EBT programs in all fifty states, the District of Columbia, and the U.S. Virgin Islands. *See* Press Release, U.S. Dep’t of Agric., USDA Approves Program to Feed Kids in Idaho: Pandemic EBT Now Available in All 50 States (Aug. 19, 2020), <https://www.usda.gov/media/press-releases/2020/08/19/usda-approves-program-feed-kids-idaho> [<https://perma.cc/95R9-9W2J>].

266. *State Guidance on Coronavirus P-EBT*, FOOD & NUTRITION SERV., <https://www.fns.usda.gov/snap/state-guidance-coronavirus-pandemic-ebt-pebt> [<https://perma.cc/A6D9-456C>]; *see also* LAUREN BAUER, ABIGAIL PITTS, KRISTA RUFFINI & DIANE WHITMORE SCHANZENBACH, HAMILTON PROJECT, THE EFFECT OF PANDEMIC EBT ON MEASURES OF FOOD HARDSHIP 3 (2020), [https://www.hamiltonproject.org/assets/files/P-EBT\\_LO\\_7.30.pdf](https://www.hamiltonproject.org/assets/files/P-EBT_LO_7.30.pdf) [<https://perma.cc/N8WU-KRQM>] (analyzing impact). Congress extended P-EBT with an additional \$1.15 billion appropriation through the end of the designated public health emergency. American Rescue Plan Act § 1101(b).

267. *See* ZOË NEUBERGER, CRYSTAL FITZSIMONS, DOTTIE ROSENBAUM & ETIENNE MELCHER PHILBIN, CTR. ON BUDGET & POL’Y PRIORITIES & FOOD RSCH. & ACTION CTR., LESSONS FROM EARLY IMPLEMENTATION OF PANDEMIC-EBT OPPORTUNITIES TO STRENGTHEN ROLLOUT FOR SCHOOL YEAR 2020-2021 (2020), <https://www.cbpp.org/sites/default/files/atoms/files/10-8-20fa.pdf> [<https://perma.cc/L67E-U9CF>] [hereinafter LESSONS FROM EARLY IMPLEMENTATION OF PANDEMIC-EBT].

268. *Id.*

269. *State-by-State Guide to the 2020-21 Pandemic EBT Program*, URB. INST. (Aug. 31, 2021), <https://www.urban.org/state-guide-pandemic-ebt> [<https://perma.cc/K2Z9-MGDA>].

*b. Unemployment Assistance*

Congress also expanded the amount, duration, and scope of UI benefits for people who lost work due to the COVID-19 pandemic.<sup>270</sup> Congress passed the CARES Act, which provided a \$600-per-week UI supplement—called Federal Pandemic Unemployment Compensation—through July 31, 2020,<sup>271</sup> followed by an additional \$300-per-week payment for eleven weeks,<sup>272</sup> to be paid on top of state benefits. Congress also extended the duration of UI benefits, providing additional weeks of federally funded support for workers who had exhausted state benefits.<sup>273</sup> Congress then extended these UI benefits twice more.<sup>274</sup> The COVID relief legislation also temporarily expanded UI eligibility. Specifically, Congress provided federal funding for states to pay benefits to workers who lost hours (even if they retained their jobs). Congress also created a new program called Pandemic Unemployment Assistance (PUA) for nonemployee workers otherwise excluded from UI programs.<sup>275</sup>

*c. Medicaid*

Furthermore, Congress financed states' costs from rising Medicaid enrollment, in part to prevent states from cutting benefits. In the Families First Act, Congress temporarily increased the FMAP for state and territorial Medicaid programs by 6.2 percent until the end of the public health emergency.<sup>276</sup> States had to meet various conditions to be eligible for the increased matching funds: they could not impose more restrictive Medicaid eligibility standards or procedures, they could not increase premiums, and they could not terminate

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270. State governments also implemented their own changes to unemployment benefits. *See COVID-19: Unemployment Benefits*, NAT'L CONF. OF STATE LEGISLATURES (July 16, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-unemployment-benefits.aspx> [<https://perma.cc/U6AN-7QE8>].

271. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2104, 134 Stat. 281, 318–21 (2020).

272. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 203, 134 Stat. 1182, 1263 (2021).

273. *Id.*

274. The Appropriations Act extension ran through March 14, 2021. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 201, 134 Stat. 1182, 1396 (2021). The American Rescue Plan extended the UI scheme further through September 6, 2021. American Rescue Plan Act § 2901.

275. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, §§ 2102, 2108, 2109, 134 Stat. 281, 313–17, 328–30 (2020).

276. Families First Coronavirus Response Act, Pub. L. No. 116-127, § 6008, 134 Stat. 178, 208–09 (2020). Congress also provided \$178 billion in funding for medical providers. TERESA A. COUGHLIN, URB. INST., THE COVID-19 PROVIDER RELIEF FUND 1 (2022) <https://www.urban.org/sites/default/files/2022-08/The%20Covid-19%20Provider%20Relief%20Fund.pdf> [<https://perma.cc/R92Z-GEZL>]; *see also Audit of CARES Act Provider Relief Funds—Payments to Health Care Providers That Applied for General Distribution Under Phases 1, 2, and 3*, U.S. DEP'T OF HEALTH & HUM. SERVS. (2021), <https://oig.hhs.gov/reports-and-publications/workplan/summary/wp-summary-0000587.asp> [<https://perma.cc/P4XN-5228>].

beneficiaries from the program involuntarily.<sup>277</sup> Every state took the offered FMAP increase.<sup>278</sup> In part because of these policies, recent statistics document that Medicaid enrollment surged during the pandemic.<sup>279</sup>

## 2. *Newfound Enthusiasm for Cash*

In addition to relying on existing programs, Congress showed a newfound enthusiasm for cash payments. Congress initially directed the Internal Revenue Service (IRS) to send “recovery rebate” checks of \$1,200 per person and \$500 per child to millions of American households.<sup>280</sup> Congress then authorized additional payments of \$600 per person, including children, in late 2020 and \$1,400 per person in early 2021.<sup>281</sup>

Congress also temporarily modified the structure of the EITC and the CTC. The EITC provision allowed taxpayers to use their 2019 income, rather than their 2020 income, to calculate the credit amount for 2020.<sup>282</sup> This change ensured that taxpayers would not receive a smaller credit because they lost work due to the pandemic.<sup>283</sup> In 2021, Congress made the CTC fully refundable and available to otherwise eligible taxpayers with no earned income. The American Rescue Plan also temporarily increased the amount of the CTC for low- and middle-income taxpayers to up to \$3,600 for each child under six and up to \$3,000 for each child between the ages of six and seventeen.<sup>284</sup>

In short, Congress was willing to spend big. There may be multiple reasons for this flurry of legislation. There appeared to be an understanding on Capitol Hill that the federal fiscal response to the Great Recession was insufficient.<sup>285</sup> It

277. Families First Coronavirus Response Act, Pub. L. No. 116-127, § 6008, 134 Stat. 178, 208–09 (2020).

278. Nicole Huberfeld & Sidney Watson, *Medicaid’s Vital Role in Addressing Health and Economic Emergencies*, in COVID-19 POLICY PLAYBOOK 103, 106 (2020) [https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/5f445cba4de0e201344f78d3/1598315706858/Chp13\\_COVIDPolicyPlaybook-Aug2020.pdf](https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/5f445cba4de0e201344f78d3/1598315706858/Chp13_COVIDPolicyPlaybook-Aug2020.pdf) [<https://perma.cc/4HY8-JGUY>].

279. See CTRS. FOR MEDICARE & MEDICAID SERVS., DECEMBER 2020 & JANUARY 2021 MEDICAID AND CHIP ENROLLMENT TRENDS SNAPSHOT, <https://www.medicaid.gov/medicaid/national-medicaid-chip-program-information/downloads/december-2020-january-2021-medicaid-chip-enrollment-trend-snapshot.pdf> [<https://perma.cc/4LJE-QL8L>].

280. 26 U.S.C. § 6428.

281. Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, § 203, 134 Stat. 1182, 1263 (2021); American Rescue Plan Act § 9601. Payments phased out for income above \$75,000 for individuals and \$150,000 for married couples.

282. American Rescue Plan Act § 9626.

283. *Id.* § 9621. Congress also temporarily expanded both eligibility for and the amount of EITC for people without qualifying children by lowering the minimum age and raising the maximum age. The legislation also temporarily raised the maximum childless EITC increases from \$543 to \$1,502 in 2021.

284. *Id.* § 9611. These increases gradually phased out until the credit amount equaled the previous maximum of \$2,000 per child. These thresholds are \$75,000 for individuals and \$150,000 for married couples. *Id.*

285. See, e.g., Michael Grunwald, *About That Next Bailout: One Big Lesson from 2009*, POLITICO (Aug. 3, 2020), <https://www.politico.com/news/magazine/2020/08/03/obama-stimulus-congress-bailout-lessons-390951> [<https://perma.cc/GV7K-HFQB>].

was also a presidential election year. The response from Washington might have been more tepid if the President, the entire House, and a third of the Senate were not up for reelection. Despite the looming election, Congress still dithered for months after the initial round of stimulus in early 2020, while millions of Americans got sick or were out of work.<sup>286</sup> Congress passed the first four stimulus bills in a six-week period between early March and late April 2020, but then did not pass additional stimulus for eight months (and only then at end of the lame-duck session on December 27th).<sup>287</sup> Nonetheless, the level of national action had a massive and measurable impact: despite the heaviest job losses since the 1930s, poverty went down in 2020.<sup>288</sup> Another insight is that the greater the extent to which climate disaster relief continues to be thought of as a localized or regional problem, the more likely appropriations will be subject to partisanship. The COVID-19 pandemic, while not hitting the country with equal force at the same time, has been national and global in scope. That might explain why the federal government was willing to craft such a forceful fiscal response.

### 3. *Fractures Along State and Racial Lines*

Despite the flurry of congressional activity in response to the pandemic, not all the federal funds reached people in need. There are three main reasons for this, all of which reinforce our understanding of how federalism and a racial hierarchy define U.S. social policy. These insights provide additional lessons for how to adapt welfare programs in the face of climate change.

#### a. *Uneven State Implementation*

First, the federal government's reliance on existing programs, many of which depend on state administration, meant that the implementation of pandemic-related relief across the country would necessarily be quite uneven. Some states are better than others at implementing federal welfare law. For instance, in several states including Florida, Kentucky, Michigan, and New York, agencies could not respond to the volume of applications for UI.<sup>289</sup> New

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286. See Hammond, Kleiman & Scheffler, *supra* note 31, at 162 (explaining Congress's inability to pass an additional stimulus in the fall of 2020 exacerbated racially disparate impacts of the pandemic).

287. Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 116-123, 134 Stat. 146 (Mar. 2020); Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (Mar. 2020); CARES Act, Pub. L. No. 116-136, 135 Stat. 281 (Mar. 2020); Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139 (Apr. 2020); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (Dec. 2020).

288. Ben Casselman & Jeanna Smialek, *U.S. Poverty Fell Last Year as Government Aid Made Up for Lost Jobs*, N.Y. TIMES (Sept. 14, 2021), <https://www.nytimes.com/2021/09/14/business/economy/census-income-poverty-health-insurance.html> [https://perma.cc/SR2C-9RDT].

289. Emilee Speck, *Florida DEO Limits Number of People Able to Access CONNECT Unemployment Site*, CLICKORLANDO (Apr. 29, 2020), <https://www.clickorlando.com/news/local/2020/04/29/florida-deo-limits-number-of-people-able-to-access-connect-unemployment-site/> [https://perma.cc/6QWP-CWPB]; Karolina Buczek, *Kentucky*



Jersey asked applicants to file online before 7 a.m. or after 10 p.m. so as not to overload the system.<sup>290</sup> One may be tempted to explain away this state-level bungling. After all, more people in the United States lost their jobs in 2020 than in any year since 1939.<sup>291</sup> Perhaps this was simply an unprecedented demand on state bureaucracies. But states have routinely ignored and disinvested in their UI systems since the Great Recession.<sup>292</sup> As already discussed, there are fiscal reasons why states do so. States feel little pressure to fund countercyclical programs during boom times, and due to their budget rules, they are incapable of doing so during downturns. Similar delays at the state and local levels continued to plague the Emergency Rental Assistance Program. Over a year into the pandemic, 89 percent of that funding had not reached renters.<sup>293</sup>

A new program that builds on a preexisting apparatus, as P-EBT does with SNAP, presents additional problems. States failed to deliver food assistance to children through P-EBT because of various administrative errors.<sup>294</sup> Take Tennessee. That state delivered the additional \$250 of P-EBT to households that were already enrolled in SNAP or TANF, but failed to deliver P-EBT to families not already enrolled in either program.<sup>295</sup> Many children are poor enough to receive free or reduced-price school meals but do not receive SNAP or TANF; other children are not individually eligible for subsidized school meals but still

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*Unemployment Claims Overload System, but State Is Working on a Fix*, LEX 18 WASH. (Apr. 2, 2020), <https://www.lex18.com/news/coronavirus/kentucky-unemployment-claims-overload-system-but-state-is-working-on-a-fix> [<https://perma.cc/9VBN-K4NC>]; Megan Cassella & Katy Murphy, *States Overwhelmed by Previously Unimaginable Layoff Numbers*, POLITICO (Apr. 1, 2020), <https://www.politico.com/news/2020/04/01/unemployed-workers-benefits-coronavirus-159192> [<https://perma.cc/8J4G-LNRV>].

290. Cassella & Murphy, *supra* note 289.

291. Sarah Chaney Cambon & Danny Douherty, *Job Losses in 2020 Were Worst Since 1939, With Hispanics, Blacks, Teenagers Among Hardest Hit*, WALL ST. J. (Jan. 8, 2021), <https://www.wsj.com/articles/job-losses-in-2020-were-worst-since-1939-with-hispanics-blacks-teenagers-among-hardest-hit-11610133434> [<https://perma.cc/438S-PH5M>].

292. U.S. DEP'T OF LAB., STATE UNEMPLOYMENT INSURANCE: TRUST FUND SOLVENCY REPORT (2020), <https://oui.doleta.gov/unemploy/docs/trustFundSolvReport2020.pdf> [<https://perma.cc/F8TV-EDZF>] (finding that twenty-two states were not adequately funding their UI trust funds as of early 2020). For more on uneven state implementation during the Great Recession, see Karen Dynan & Douglas Elmendorf, *National Fiscal Policies to Fight Recessions in US States*, 110 AM. ECON. ASS'N 131 (2020); *The Unemployment Pandemic: Addressing America's Jobs Crisis: Hearing Before the H. Select Subcomm. on the Coronavirus Crisis* (2020) (prepared testimony of Jason Furman, Professor, Harvard Univ.), <https://www.pii.com/sites/default/files/documents/2020-06-18-furman-testimony-pandemic-unemployment.pdf> [<https://perma.cc/D59K-9QUH>].

293. Glenn Thrush & Alan Rappeport, *About 89% of Rental Assistance Funds Have Not Been Distributed, Figures Show*, N.Y. TIMES (Aug. 25, 2021), <https://www.nytimes.com/2021/08/25/us/politics/eviction-rental-assistance.html> [<https://perma.cc/EEQ2-D9QV>].

294. See generally LESSONS FROM EARLY IMPLEMENTATION OF PANDEMIC-EBT, *supra* note 267 (discussing state options in implementing the new program).

295. See, e.g., Natalie Allison, *Tennessee Could Forfeit \$60M in Federal Food Aid for Low-Income Families During Coronavirus Pandemic*, NASHVILLE TENNESSEAN (July 30, 2020), <https://www.tennessean.com/story/news/politics/2020/07/30/tennessee-may-forfeit-60-m-pandemic-ebt-funds-applications-stall/5535427002/> [<https://perma.cc/8SQ6-HW5A>].

receive them through school-wide eligibility.<sup>296</sup> Failing to navigate these intricacies, Tennessee botched food assistance to 388,000 children and delayed the distribution of approximately \$60 million in federal funds.<sup>297</sup>

States are also better at implementing certain federal programs than others. For instance, unlike Tennessee, Florida readily implemented the COVID-related changes to SNAP, including direct issuance of P-EBT.<sup>298</sup> But Florida's UI system cratered.<sup>299</sup> At some level, Florida's incompetence betrays willfulness. One of Florida Governor Ron DeSantis's advisors explained that former Governor Rick Scott's administration designed the state's online system for UI with the intent of "making it harder for people to get benefits or keep benefits so that the unemployment numbers were low to give the governor something to brag about."<sup>300</sup> This strategy of bureaucratic disentanglement, by which a lack of capacity, obscure rules, and unwritten practices subvert statutory commands, has a long history in social welfare.<sup>301</sup> However, it is often difficult to detect whether these problems reflect the intent of policymakers or simply the complexity of administering public benefits.

#### *b. Unwilling State Implementation*

Second, while some states failed to deliver assistance because of administrative incompetence, some states failed to deliver assistance because they did not want to participate in a particular federal policy. For example, twenty-six states opted out of PUA before the federal government's cutoff date of September 6, 2021.<sup>302</sup> Even though these weekly enhanced benefits of \$300

296. *Child Nutrition Programs: Community Eligibility Provision*, FOOD & NUTRITION SERV. (Apr. 19, 2019), <https://www.fns.usda.gov/cn/community-eligibility-provision> [<https://perma.cc/WZS3-CDEX>] (describing community eligibility as "allow[ing] the nation's highest poverty schools and districts to serve breakfast and lunch at no cost to all enrolled students without collecting household applications").

297. See, e.g., Allison, *supra* note 295; Cathryn Stout, *As Deadline for Summer P-EBT Eligibility Looms, Tennessee Addresses Delays*, CHALKBEAT TENN. (July 30, 2021), <https://tn.chalkbeat.org/2021/7/30/22602547/tennessee-eligible-pebt-application-saturday-summer-meals> [<https://perma.cc/VP4R-8B8W>].

298. See LESSONS FROM EARLY IMPLEMENTATION OF PANDEMIC-EBT, *supra* note 267, at 6 fig.1.

299. Allie Gottlieb, *Florida's Unemployment Insurance System Breaks Down Under COVID-19*, REGUL. REV. (Apr. 28, 2020), <https://www.theregreview.org/2020/04/28/gottlieb-floridas-unemployment-insurance-system-breaks-down-under-covid-19/> [<https://perma.cc/S4DJ-JEVN>].

300. Gary Fineout & Marc Caputo, *"It's a Sh— Sandwich": Republicans Rage as Florida Becomes a Nightmare for Trump*, POLITICO (Apr. 3, 2020), <https://www.politico.com/states/florida/story/2020/04/03/its-a-sh-sandwich-republicans-rage-as-florida-becomes-a-nightmare-for-trump-1271172> [<https://perma.cc/4XG8-ZYTT>].

301. See Michael Lipsky, *Bureaucratic Disentanglement in Social Welfare Programs*, 58 SOC. SERV. REV. 3, 3 (1984) (defining bureaucratic disentanglement as the process by which "obligations to social welfare beneficiaries are reduced and circumscribed through largely obscure 'bureaucratic' actions and inactions of public authorities").

302. *Workers Prematurely Cut Off*, CENTURY FOUND. (Sept. 26, 2021), [https://public.tableau.com/app/profile/tcf.data/viz/WorkersPrematurelyCutoff/\\_4\\_3\\_workers\\_premature\\_cutoff](https://public.tableau.com/app/profile/tcf.data/viz/WorkersPrematurelyCutoff/_4_3_workers_premature_cutoff) [<https://perma.cc/EJ5A-QVAV>].

were financed by the federal government, states argued they needed to forego this funding because of a labor shortage.<sup>303</sup> So far, there is little evidence that cutting off unemployment assistance helped reverse the labor shortage.<sup>304</sup> Yet, the consequences for people in need were stunning. Take Texas. The state's decision to cut off PUA in June 2022 meant Texas relinquished roughly \$6.5 billion in federal funding, which impacted almost a million workers—of whom 767,000 lost all UI benefits.<sup>305</sup>

For food assistance, some states decided not to renew emergency declarations in 2021, which cut off SNAP recipients from receiving additional benefits.<sup>306</sup> Furthermore, twelve states also opted out of continuing P-EBT, denying additional food assistance to children.<sup>307</sup> Florida refused to apply for the summer 2021 P-EBT funding for months, delaying an additional \$820 million in federal funds for approximately 2.7 million children.<sup>308</sup>

These refusals and delays by state officials to draw down federal funds intended for poor residents are not new. Indeed, many of the states that refused to extend pandemic-related assistance are also states that chose not to participate in the Affordable Care Act's Medicaid expansion, even though the federal government would have paid nearly all of the state's costs for the first ten years.<sup>309</sup> Still, the fact that so many states have willfully rejected federal funding to support their poorest residents should inform our thinking on how to adapt welfare programs for climate change.

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303. See, e.g., Press Release, Off. of the Governor of Iowa Kim Reynolds, Iowa to End Participation in Federal Unemployment Benefit Programs (May 11, 2021), <https://governor.iowa.gov/press-release/iowa-to-end-participation-in-federal-unemployment-benefit-programs%C2%A0citing-strong> [<https://perma.cc/PP6A-ENBL>].

304. Sarah Chaney Cambon & Danny Dougherty, *States That Cut Unemployment Benefits Saw Limited Impact on Job Growth*, WALL ST. J. (Sept. 1, 2021), <https://www.wsj.com/articles/states-that-cut-unemployment-benefits-saw-limited-impact-on-job-growth-11630488601> [<https://perma.cc/T5UC-JY3R>].

305. CENTURY FOUND., *supra* note 302.

306. See, e.g., Laura Reiley, *Some States Are Cutting Off Emergency Food-Assistance Programs and Making It Harder to Qualify*, WASH. POST (June 18, 2021), <https://www.washingtonpost.com/business/2021/06/18/republican-states-restrict-snap-food-assistance-usda/> [<https://perma.cc/V26S-TE52>]; Grant Schulte, *Ricketts Stands by Decision to Discontinue Emergency SNAP*, AP NEWS (Sept. 24, 2020), <https://apnews.com/article/virus-outbreak-pete-ricketts-omaha-nebraska-archive-dfb8da0712f6f4cb9307412049ab29a2> [<https://perma.cc/WY27-NCD7>].

307. *State Guidance on Coronavirus P-EBT in Schools*, FOOD & NUTRITION SERV. (June 17, 2022), <https://www.fns.usda.gov/snap/state-guidance-coronavirus-pandemic-ebt-pebt-sy20-21> [<https://perma.cc/JJR3-GYPC>].

308. Lisa Marie Garza, *After Delay, Florida Applies for Federal Pandemic Food Aid for Low-Income Children*, ORLANDO SENTINEL (Sept. 24, 2021), <https://www.orlandosentinel.com/news/education/os-ne-florida-pandemic-food-stamps-application-children-20210925-efpwlip3wrbkzlvjwvy3hm7pue-story.html> [<https://perma.cc/7KTW-T7QY>].

309. See Rachel Garfield, Kendal Orgera & Anthony Damico, *The Coverage Gap: Uninsured Poor Adults in States That Do Not Expand Medicaid*, KAISER FAM. FOUND. (Jan. 21, 2021), <https://www.kff.org/medicaid/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid/> [<https://perma.cc/K4GE-8PWM>].

c. *The Racialized Hierarchy of the Pandemic Response*

The third reason the public benefits response to the COVID-19 pandemic was so uneven is that relying on preexisting programs to deliver assistance perpetuates the racial hierarchy of the American welfare state. Southern states continue to deny federal assistance for their poorest residents, who are disproportionately Black and Latinx.<sup>310</sup> Meanwhile, the default arrangement of federal-state cooperation leaves out millions, especially immigrants, people in the five territories, and tribal members.

Although Congress expanded Medicaid for COVID-related testing and treatment coverage, it chose not to cover undocumented immigrants or workers in certain health care settings, including home healthcare workers.<sup>311</sup> Testing sites turned away people of color who had coverage through Medicaid.<sup>312</sup> Additionally, essential workers are disproportionately people of color, and Black Americans are the most likely to be frontline or essential workers.<sup>313</sup> These workers were the most likely to be exposed to COVID-19 in the workplace.<sup>314</sup>

This racism and xenophobia in the federal and state governments' pandemic response extended beyond the public benefit context.<sup>315</sup> Some states

310. See KELLY WHITENER, MATTHEW SNIDER & ALEXANDRA CORCORAN, GEORGETOWN UNIV. CTR. FOR CHILD. & FAMS., EXPANDING MEDICAID WOULD HELP CLOSE COVERAGE GAP FOR LATINO CHILDREN AND PARENTS 5, 7 (2021), <https://ccf.georgetown.edu/wp-content/uploads/2021/06/Expanding-Medicaid-Would-Help-Close-Coverage-Gap-for-Latino-Children-and-Parents.pdf> [<https://perma.cc/7AX7-66RA>] (relating that in Texas, 41 percent of Latinx parents, and almost 18 percent of Latinx children, are uninsured—higher than any other state); Alana Semuels, *States with Large Black Populations Are Stingier with Government Benefits*, THE ATLANTIC (June 6, 2017), <https://www.theatlantic.com/business/archive/2017/06/race-safety-net-welfare/529203> [<https://perma.cc/SS4X-QVBW>].

311. Andrew Donlan, “I Deserve to Be Respected”: Home Care Workers Make Emotional Plea for Better Treatment, HOME HEALTH CARE NEWS (Apr. 15, 2020), <https://homehealthcarenews.com/2020/04/i-deserve-to-be-respected-home-care-workers-make-emotional-plea-for-better-treatment/> [<https://perma.cc/YLA2-CZK4>].

312. See, e.g., Sheila Selman, *Company Apologizes for Discrimination Against Latinos at Goshen COVID-19 Testing Site*, GOSHEN NEWS (July 3, 2020), [https://www.goshennews.com/news/company-apologizes-for-discrimination-against-latinos-at-goshen-covid-19-testing-site/article\\_10ff0bf2-bc8a-11ea-b0c6-eb3aed4bb58c.html](https://www.goshennews.com/news/company-apologizes-for-discrimination-against-latinos-at-goshen-covid-19-testing-site/article_10ff0bf2-bc8a-11ea-b0c6-eb3aed4bb58c.html) [<https://perma.cc/3AVD-3KDE>]; Lynn Bonner, *State Adviser: Some NC Latinos Sick with COVID-19 Are Sent Home from Hospitals*, NEWS & OBSERVER (July 16, 2020), <https://www.newsobserver.com/news/coronavirus/article244272717.html> [<https://perma.cc/4DY4-RNAN>].

313. BUREAU OF LAB. STAT., *Household Data Annual Averages: Employed Persons by Detailed Industry, Sex, Race, and Hispanic or Latino Ethnicity*, in LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (Jan. 20, 2022), <https://www.bls.gov/cps/cpsaat18.htm> [<https://perma.cc/FR26-J8UW>]; Devan Hawkins, *The Coronavirus Burden Is Falling Heavily on Black Americans. Why?*, THE GUARDIAN (Apr. 16, 2020), <https://www.theguardian.com/commentisfree/2020/apr/16/black-workers-coronavirus-covid-19> [<https://perma.cc/6THY-ZU6V>].

314. See Ruqaiyah Yearby & Seema Mohapatra, *Systemic Racism, the Government's Pandemic Response, and Racial Inequities in COVID-19*, 70 EMORY L.J. 1419, 1463–65 (2021).

315. In the South, government officials placed the majority of vaccine allocation sites in predominantly White neighborhoods. Sean McMinn, Shalina Chatlani, Ashley Lopez, Sam Whitehead,

have denied undocumented immigrants access to vaccines<sup>316</sup> or required identification in order to be vaccinated.<sup>317</sup> In March 2021, Texas Governor Greg Abbott blamed, without evidence, an increase in COVID-19 infections on undocumented immigrants from Mexico.<sup>318</sup> Alex Azar, President Trump's Secretary of Health and Human Services, publicly stated that disparities in COVID-19 infections and deaths among Latinx Americans may be associated with their culture.<sup>319</sup>

This racial hierarchy also manifested in the stingier assistance provided to territories and Tribes. While Congress made some efforts to mirror the public benefit expansions for states, territories and Tribes still received significantly less assistance. For instance, Congress did authorize additional nutrition assistance for CNMI, Puerto Rico, and American Samoa, the three territories that federal law excludes from SNAP.<sup>320</sup> Yet, none of these territories benefited from the emergency allotments or increased benefits to SNAP outlined earlier.<sup>321</sup> Furthermore, Congress places funding caps on territorial Medicaid.<sup>322</sup> Before the pandemic hit, this funding cap limited Puerto Rico to providing only ten of Medicaid's seventeen mandatory services.<sup>323</sup> Congress did make additional

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Ruth Talbot & Austin Fast, *Across the South COVID-19 Vaccine Sites Missing from Black and Hispanic Neighborhoods*, NPR (Feb. 5, 2021), <https://www.npr.org/2021/02/05/962946721/across-the-south-covid-19-vaccine-sites-missing-from-black-and-hispanic-neighbor> [https://perma.cc/A4CT-RD7H].

316. William Saletan, *The GOP's Foolish Campaign Against Vaccinating Undocumented Immigrants*, SLATE (Mar. 9, 2021), <https://slate.com/news-and-politics/2021/03/republicans-covid-vaccines-undocumented-immigrants-lies.html> [https://perma.cc/6ANT-6VW6].

317. Akilah Johnson, *For Immigrants, IDs Prove to Be a Barrier to a Dose of Protection*, WASH. POST (Apr. 10, 2021), <https://www.washingtonpost.com/health/2021/04/10/covid-vaccine-immigrants-id/> [https://perma.cc/N4VE-MSSX].

318. Noah Higgins-Dunn, *Texas Gov. Abbott Blames Covid Spread on Immigrants, Criticizes Biden's 'Neanderthal' Comment*, CNBC (Mar. 4, 2021), <https://www.cnbc.com/2021/03/04/texas-gov-abbott-blames-covid-spread-on-immigrants-criticizes-bidens-neanderthal-comment.html> [https://perma.cc/6XNR-J43U].

319. Sarah Westwood & Sunlen Serfaty, *HHS Secretary Tells Lawmakers Lifestyles of Meat-Processing Plant Employees Worsened Covid-19 Outbreak*, CNN (May 7, 2020), <https://www.cnn.com/2020/05/07/politics/alex-azar-meat-processing-plants/index.html> [https://perma.cc/YJK5-QGQD].

320. See Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 1102, 2302(a)(1), 134 Stat. 178, 180, 188 (2020); American Rescue Plan Act of 2021 § 1103(b). These three territories normally receive a block grant of funding as opposed to the entitlement funding enjoyed by the rest of the United States. See Hammond, *Territorial Exceptionalism*, *supra* note 31, at 1669–72 (discussing the exclusion of these territories from safety net programs including SNAP).

321. See BRYNNE KEITH JENNINGS & ELIZABETH WOLKOMIR, CTR. ON BUDGET & POL'Y PRIORITIES, *HOW DOES HOUSEHOLD FOOD ASSISTANCE IN PUERTO RICO COMPARE TO THE REST OF THE UNITED STATES?* 5–7 (2020), <https://www.cbpp.org/sites/default/files/atoms/files/11-27-17fa.pdf> [https://perma.cc/ER4C-2HT7].

322. 42 U.S.C. § 1308(b)(1) (laying out the Medicaid annual grant formula for the territories); see, e.g., ROBIN RUDOWITZ, CORNELIA HALL & BARBARA LYONS, *MEDICAID FINANCING CLIFF: IMPLICATIONS FOR THE HEALTH CARE SYSTEMS IN PUERTO RICO AND USVI* 4 (2019), <https://files.kff.org/attachment/Issue-Brief-Medicaid-Financing-Cliff-Implications-for-the-Health-Care-Systems-in-Puerto-Rico-and-USVI> [https://perma.cc/JY9A-TXNW].

323. See *MEDICAID & CHIP PAYMENT & ACCESS COMM'N, MEDICAID AND CHIP IN PUERTO RICO* 2 (2020), <https://www.macpac.gov/wp-content/uploads/2020/08/Medicaid-and-CHIP-in-Puerto>

Medicaid funding available, but at a percentage lower than that in the states.<sup>324</sup> The most significant step Congress took to treat Americans in the territories on par with their fellow Americans in the fifty states was expanding PUA to the entire country.<sup>325</sup>

Tribes received funding from Congress to provide access to testing and treatment, but many people living on reservations or land trusts,<sup>326</sup> especially tribal members and Alaska Native people, lacked access due to decades of disinvestment in health infrastructure.<sup>327</sup> Additionally, the CARES funding money was initially only disbursed to health-care facilities on reservations and other land trusts, leaving Native peoples who did not reside there without access to testing and treatment.<sup>328</sup> Moreover, the 200 Tribes that are not recognized by the United States did not receive any federal assistance during the pandemic.<sup>329</sup>

The pandemic response offers at least three insights into efforts to adapt welfare programs to meet the climate crisis. First, Congress and federal agencies can mitigate suffering for millions of Americans through existing programs. Second, reliance on preexisting programs, many of which rely on state and local action, almost guarantees that the distribution of assistance will be uneven, and some elected officials at the state level will forego millions and billions of dollars of federal funds intended for their residents. Third, these preexisting programs reflect and reproduce a racial hierarchy that ensures that people in some states, immigrants in all states, people in the five territories, and tribal members receive less assistance. Combining these insights from the COVID-19 pandemic with the earlier discussions about the challenges of congressional capacity and state responses, Part IV, the last of the Article, focuses on what federal, state,

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Rico.pdf [https://perma.cc/TZ93-7JH6]; MEDICAID & CHIP PAYMENT & ACCESS COMM'N, MEDICAID AND CHIP IN THE TERRITORIES 4 tbl.2 (2021), <https://www.macpac.gov/wp-content/uploads/2019/07/Medicaid-and-CHIP-in-the-Territories.pdf> [https://perma.cc/B3R6-MXJA].

324. See Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020). These actions raised American Samoa's FY 2020 allotment from \$12.4 million to \$86.3 million and its FY 2021 allotment from approximately \$12.7 million to \$85.6 million. See CONG. RSCH. SERV., MEDICAID FINANCING FOR THE TERRITORIES 1 (2020), <https://crsreports.congress.gov/product/pdf/IF/IF11012> [https://perma.cc/4HXG-RN3E].

325. See John Pallasch, Assistant Sec'y, U.S. Dep't of Lab., Advisory Letter No. 16-20 to State Workforce Agencies 5 (Apr. 5, 2020), [https://wdr.doleta.gov/directives/attach/UIPL/UIPL\\_16-20.pdf](https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20.pdf) [https://perma.cc/7SPS-XAD9] (relaying that the PUA "program is available in all 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands").

326. See *id.*

327. Talha Burki, *COVID-19 Among American Indians and Alaska Natives*, 21 LANCET 325, 325 (2021); see also Katherine Florey, *Toward Tribal Regulatory Sovereignty in the Wake of the Covid-19 Pandemic*, 63 ARIZ. L. REV. 399, 415–21 (2021) (discussing the ways in which Supreme Court doctrine interfered with tribal governance in public health emergencies).

328. Casey Kuhn, *Why Indigenous People in Cities Feel 'Invisible' as Pandemic Wears On*, PBS NEWSHOUR (Feb. 23, 2021), <https://www.pbs.org/newshour/health/why-indigenous-people-in-cities-feel-invisible-as-pandemic-wears-on> [https://perma.cc/ZYA3-KJG7].

329. Eilis O'Neill, *Unrecognized Tribes Struggle Without Federal Aid During Pandemic*, NPR (Apr. 17, 2021), <https://www.npr.org/2021/04/17/988123599/unrecognized-tribes-struggle-without-federal-aide-during-pandemic>.

territorial, and tribal governments can do to improve individual access to public benefits in light of the climate crisis.

#### IV.

##### ADAPTING WELFARE PROGRAMS FOR THE CLIMATE CRISIS

This century will be one of fitful and then rapid transformation to adapt to life on an increasingly hostile planet. Where we live, how we work, how we move, and what we consume will change. Among these countless changes will be how our government responds to those who have been displaced and those whose livelihoods have been destroyed by our changing climate. This Part sketches possible adaptations in public benefits that will help Americans weather the wildfires and storms made more devastating by the climate crisis.

Before getting into the details, though, it is worth addressing a scholarly criticism of these prescriptions—a criticism that, frankly, can be leveled at most legal scholarship that calls for government action. Eric Posner and Adrian Vermeule have identified an “inside/outside fallacy” endemic to public law scholarship.<sup>330</sup> According to them, this scholarship offers “deeply pessimistic accounts of the ambitious, partisan, or self-interested motives of relevant actors in the legal system” only to then “turn around and issue an optimistic proposal for public-spirited solutions.”<sup>331</sup> For a few reasons, Posner and Vermeule’s critique is less persuasive here.

First, this Article predicts that policy-making on climate adaptation will align with how Congress operates.<sup>332</sup> If members of Congress are “single-minded seekers of reelection,” then the increasing prevalence of climate-fueled disasters will create such consistent constituent and electoral pressure that representatives will need to respond.<sup>333</sup> In that way, the proposals that follow recognize those incentives and build on them.<sup>334</sup> From the perspective of individual members of Congress, many of the following proposals, including flexibility for applications by the elderly and people with disabilities or longer eligibility windows for counties where infrastructure has yet to get back online, would be cheap to

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330. See Eric Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013).

331. *Id.*; see also, e.g., David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 1032 n.254 (2017) (agreeing that “policymakers generally work within, the limitations it imposes on new policy, and legal scholars’ tendency to ignore those limitations”).

332. Cf. Posner & Vermeule, *supra* note 330, at 1763 (critiquing scholarship that does not attend to the realities of lawmaking).

333. DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5 (1974); see also Jamie L. Carson & Jeffery A. Jenkins, *Examining the Electoral Connection Across Time*, 14 ANN. REV. POL. SCI. 25, 27 (2011) (describing “Mayhew’s . . . notion of the electoral incentive” as “the theoretical foundation for much of the contemporary research examining the U.S. Congress”).

334. See, e.g., Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 139 (2016) (making similar proposals).

implement.<sup>335</sup> Moreover, social science suggests that the expansion of welfare programs, with its particularized benefits and diffuse costs, may be more politically feasible than subsequent retrenchment.<sup>336</sup> In other words, there might soon be more support for expanded benefits as more people's lives are upended by the climate crisis.

While it is useful to tether policy proposals to political realities, this Article has shown that the breadth of the climate crisis has begun to create new exigencies—ones that demand national action. Scholars have repeatedly concluded that crises help induce legislative and regulatory change.<sup>337</sup> Indeed, as Part III.C documents, the governmental response to the COVID-19 pandemic, while flawed, demonstrates that even in its current state, Congress can legislate quickly and comprehensively to help Americans meet basic needs during a national emergency. Part IV applies those lessons from the pandemic response to the climate context. Indeed, the fact that last year Congress managed to pass arguably the most significant climate legislation in American history suggests more legislative action is in the offing.<sup>338</sup>

Finally, some challenges, like the twin crises of the pandemic and our changing climate, are so massive that smaller-scale responses cannot replace national action. Sudden societal and political change may come sooner than

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335. See Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 261 (2000) (“[P]olitical actors, especially politicians, are often most interested in the short-term consequences of their actions; long-term effects tend to be heavily discounted.”)

336. For the classic study of welfare retrenchment in the United Kingdom and the United States, see PAUL PIERSON, *DISMANTLING THE WELFARE STATE? REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT* 131–63 (1994).

337. See KINGDON, *supra* note 206, at 90–115; Daniel Carpenter & Gisela Sin, *Policy Tragedy and the Emergence of Regulation: The Food, Drug, and Cosmetic Act of 1938*, 21 STUD. AM. POL. DEV. 149, 153 (2007) (“The claim that regulation follows certain critical events (either actual events or journalistic exposes) is common to historians of numerous fields of regulation.”); see also Gabriel Scheffler, *The Dynamism of Health Law: Expanded Insurance Coverage as the Engine of Regulatory Reform*, 10 U.C. IRVINE L. REV. 729, 771–73 (2020) (collecting examples of crises that led to an increased government role, including in the context of financial regulation, health law, consumer law, and environmental law). *But see* Peter Conti-Brown & Brian D. Feinstein, *The Contingent Origins of Financial Legislation*, 99 WASH. U. L. REV. 145, 212 (2021) (canvassing various case studies and concluding that financial crises are not a necessary precondition for financial reform).

338. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (2022). There is a considerable debate over how much this legislation will mitigate the climate crisis. Compare J.D. JENKINS, ERIN N. MAYFIELD, JAMIL FARBES, RYAN JONES, NEHA PATANKAR, QINGYU XU & GREG SCHIVLEY, REPEAT PROJECT, *PRELIMINARY REPORT: THE CLIMATE AND ENERGY IMPACTS OF THE INFLATION REDUCTION ACT OF 2022* (2022) (estimating that the legislation will “close two-thirds of the remaining emissions gap between current policy and the nation’s 2030 climate target”), with Jeffrey Sachs, Opinion, *Four Ways the Inflation Reduction Act Doesn’t Live Up to the Hype*, CNN (Aug. 19, 2022), <https://www.cnn.com/2022/08/19/opinions/inflation-reduction-act-falls-short-sachs/index.html>. [<https://perma.cc/FF37-LPA6>] (criticizing the Princeton study’s model). See generally Laura Benshoff, *Climate Experts Experience an Odd Sensation After Manchin Budget Deal: Optimism*, NPR (July 29, 2022), <https://www.npr.org/2022/07/29/1114216967/climate-experts-experience-an-odd-sensation-after-the-manchin-budget-deal-optimi> [<https://perma.cc/DG26-BTM8>] (discussing scientists’ reactions to the legislation). That debate is beyond the scope of this Article. But the fact that Congress was able to pass major climate legislation suggests that some of this Article’s proposed changes may be feasible.



some might think. Mass mobilization will create a “policy window[.]” for renewed efforts to address climate-caused displacement and devastation.<sup>339</sup> The choice is whether legal scholars should submit to the status quo or rather work toward new law when the status quo begins to fall apart.<sup>340</sup> This Article chooses the latter.

Specifically, the proposals below seek to strengthen our federal and state welfare law in ways that make public benefits more reliable, accessible, and portable. First, poor people’s access to these programs should not depend on the vagaries of politics on Capitol Hill or in the statehouses. Instead, policy-makers should decide *ex ante* who should receive what benefits when a climate-fueled disaster strikes. Second, these programs should be accessible to all people in need, not just people who can wait in line for eight hours. Third, these benefits should not vanish at a state’s borders but rather should travel with the people in need. In attempting to instantiate these principles, the proposals below include changes to federal law as well as state and local adaptations.

#### A. *Retrofitting Existing Federal Programs*

This Section explains how the federal government could improve access to disaster welfare programs. In many ways, these proposals identify ways in which the United States can retrofit existing programs to better respond to climate-fueled disasters. Specifically, Congress should amend the relevant federal statutes to make assistance more reliable, accessible, and portable.

First, Congress should legislate in ways that ensure additional funding kicks in automatically after disasters as opposed to waiting on future Congresses to make emergency appropriations. As discussed in Part III, Congress is finding it increasingly difficult to enact legislation and appropriate funds, sometimes delaying assistance by months or even a year. This reality of national lawmaking has dire consequences for a country that will continue to experience more frequent and more intense storms, fires, and floods. As a result, Congress should identify mechanisms that allow government to respond to surges in need without relying on the weaknesses and whims of the current Congress. The best way to do so is to legislate automatic stabilizers.<sup>341</sup> For instance, Congress could amend

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339. See KINGDON, *supra* note 206, at 20; see also Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 33, 136–37 (2016) (arguing that the history of American law suggests that mobilization is “a valuable political resource” for “the nonwealthy and other disenfranchised groups”).

340. For the latter, see Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 883 (2021) (criticizing much of public-facing legal scholarship for “further[ing] a form of political austerity that devastates poor and working-class people by foreclosing real change”); Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 LAW & POL’Y 97, 98 (1988) (making similar observations about sociolegal scholarship).

341. Here again, the COVID-19 pandemic is instructive. One recent study suggests that during the COVID-19 pandemic, only SNAP and UI functioned as automatic stabilizers, whereas other safety net programs showed “little buoyancy to economic downturns over the last two decades.” Robert Moffitt

the Food and Nutrition Act to allow states to automatically issue replacement and supplemental SNAP benefits following a major disaster declaration. Making these additional benefits automatic would help us avoid the odd result of people who were poor before the storm receiving less food assistance than their neighbors who receive D-SNAP after the storm.<sup>342</sup> Congress could amend the Internal Revenue Code to allow EITC recipients to use all of their prior year's income to claim the EITC in the year of a disaster.<sup>343</sup> Congress could make similar changes so that the Social Security Administration could automatically advance payments for the elderly and people with disabilities who live in a disaster area. Congress could also rely on multiple metrics from agencies with scientific expertise like the EPA or National Oceanic and Atmospheric Administration to identify when states can issue additional food assistance to children following climate-induced school closures.<sup>344</sup>

Second, federal law should make it easier for vulnerable Americans, like children, the elderly, and people with disabilities, to access benefits. Given how much our society relies on schools to feed children, Congress should extend P-EBT to households with children in major disaster areas. Just as the COVID-19 pandemic closed schools, so too will wildfires and hurricanes. In both crises, school districts must prevent children from attending out of concern for their health, whether due to a novel virus like COVID-19 or contaminated air.<sup>345</sup> Considering that one in four children in the United States has at least one foreign-born parent, Congress should revisit exclusions of non-citizens from certain disaster welfare provisions.<sup>346</sup> In light of the elderly and people with disabilities' vulnerabilities to contaminated air and extreme heat, Congress should also make it easier for these groups to access assistance, whether through pre-registration or online or telephonic applications.

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& James P. Ziliak, *COVID-19 and the U.S. Safety Net* 517 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27911, 2021).

342. See D-SNAP GUIDANCE, *supra* note 105, at 35 (identifying supplemental benefits as "provid[ing] parity between new D-SNAP households and ongoing clients, who are not eligible for D-SNAP benefits").

343. See COVID-19 Earned Income Act, S. 3542 & H.R. 6762, 116th Cong. (2020); NAT'L TAXPAYER ADVOC., *Provide Earned Income Tax Credit (EITC) Relief During National Disasters*, in PURPLE BOOK 120, 120–21 (2021), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20\\_PurpleBook\\_08\\_MiscRecs\\_54.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_PurpleBook_08_MiscRecs_54.pdf) [<https://perma.cc/988B-AVRS>].

344. See Super, *Against Flexibility*, *supra* note 21, at 1445 (discussing how to "front load" agency decision-making); see also Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 487 (2017) (observing that the production of high-quality information is "the bureaucracy's *raison d'être*").

345. See *Wildfire Smoke and Children*, CTNS. FOR DISEASE CONTROL (May 4, 2021), <https://www.cdc.gov/air/wildfire-smoke/children.htm> [<https://perma.cc/W7KW-DR3Q>]; Stephanie M. Holm, Mark D. Miller & John R. Balmes, *Health Effects of Wildfire Smoke in Children and Public Health Tools: A Narrative Review*, 31 J. EXPOSURE SCI. & ENV'T EPIDEMIOLOGY 1, 1 (2021) (identifying November 15, 2018, as the single-day record of school closures due to wildfires when over a million children in California had classes cancelled).

346. *Children in U.S. Immigrant Families (By Age Group and State, 1990 Versus 2019)*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/programs/data-hub/charts/children-immigrant-families> [<https://perma.cc/98XX-WQKE>].

Third, federal law should allow Americans to continue to receive assistance even when they have been displaced by climate-fueled disasters. Federal relief should not stumble at state borders that no storm respects. Congress should amend various statutes, or alternatively, the relevant federal agencies should promulgate regulations or issue guidance that allows assistance to follow Americans who must cross jurisdictional lines. Federal law should require or at least allow state agencies to accept and honor applications and existing benefits from another state. Following Hurricane Katrina, the federal FNS allowed individuals to use Louisiana WIC vouchers in any state to purchase diapers, infant formula, and food.<sup>347</sup> The U.S. Department of Agriculture could promulgate a legislative rule that makes this practice available for any American whose permanent address is in a major disaster area. Similarly, states should be able to honor Medicaid benefits from other states. Of course, the challenge would be the extent to which the receiving state takes on additional, unexpected costs. However, those challenges would be minimal for benefits like SNAP in which the federal government finances 100 percent of the benefits. For programs like Medicaid where states contribute significant funding, the federal government could similarly cover those additional costs by raising the federal match for new arrivals. Indeed, there is proposed legislation to do just that. During the last Congress, legislation was introduced in both the House and Senate that would allow individuals forced to relocate to another state to continue to access Medicaid, with the federal government covering the cost.<sup>348</sup>

Relatedly, in light of the challenges Americans face in accessing assistance, Americans should be able to enforce federal and state law by suing the relevant agencies. Congress should amend the Stafford Act to permit Americans to sue FEMA for violations of federal law. As Part III shows, poor people have used litigation to secure meaningful relief from state welfare agencies following major disasters. Making FEMA liable for its administration of disaster benefits creates opportunities for remedial orders following disasters and may discipline the federal agency to avoid litigation in the future. Furthermore, the United States should no longer rely on an ABA-led volunteer effort or on state bars or courts to approve out-of-state attorneys via “Katrina Rules” to provide crucial legal services to people in need after disasters.<sup>349</sup> Rather, Congress should provide additional funding to the Legal Services Corporation (LSC) so that grantee organizations can hire and train legal services attorneys who are already admitted to practice in the relevant jurisdiction. Congress should also consider revisiting

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347. CONG. RSCH. SERV., FEDERAL FOOD ASSISTANCE IN DISASTERS: HURRICANES KATRINA AND RITA 5 (2006), <https://crsreports.congress.gov/product/pdf/RL/RL33102/3> [<https://perma.cc/W5AM-KEDP>].

348. Disaster Relief Medicaid Act, H.R. 3215, 116th Cong. (2019–2020); S. 1754, 116th Cong. (2019–2020) [<https://perma.cc/RXW2-SV5Z>].

349. See Ballard et al., *supra* note 150, at 5–6 (describing how New York legal aid attorneys “faced a steep learning curve in new legal issues to adequately advise Sandy victims” and the “peculiarities of advocating for their clients’ appropriate disaster recovery benefits”).

restrictions on LSC-funded organizations to the extent that those constraints impede this area of practice.

To be sure, some of these proposals will be costly to the federal government. But the climate crisis will put increased pressure on government spending regardless of these changes. In the last thirty years, the federal government's appropriations to the Disaster Relief Fund, when adjusted for inflation, have increased ten-fold.<sup>350</sup> And there will be other massive costs associated with climate change.<sup>351</sup> The question is not whether government will have to devote more and more resources to adapt to the climate crisis, but what adaptations the government will fund. Future lawmakers will need to make difficult choices. If the past is any guide, though, Congress will continue to appropriate funding after extreme weather events to meet people's basic needs. These suggestions offer ways to make that process more equitable and effective.

### B. State and Local Adaptation to Improve Individual Access

As this Article demonstrates, there are structural reasons why states, territories, and Tribes struggle to meet surges in need. The proposals above suggest how the federal government could be more responsive in helping state and local governments respond in the wake of extreme weather events. But there is a distinct possibility that Congress does not do enough to adapt welfare programs to meet the climate crisis. In other words, it is worth considering what states, territories, and Tribes should do in the absence of meaningful national action.<sup>352</sup>

First, these governments should develop policies and practices to make assistance more reliable. For instance, they could develop pre-registration systems so that people with limited mobility need not apply in person for services. They should follow Louisiana's lead and explore how to allow people

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350. Jeff Stein & Andrew Van Dam, *Taxpayer Spending on U.S. Disaster Fund Explodes Amid Climate Change, Population Trends*, WASH. POST (Apr. 22, 2019), <https://www.washingtonpost.com/us-policy/2019/04/22/taxpayer-spending-us-disaster-fund-explodes-amid-climate-change-population-trends/> [<https://perma.cc/SM3U-PHGU>].

351. For instance, Congress and the Pentagon will need to decide what to do with the Naval Station Norfolk, the country's (and the world's) largest naval base. Carolyn Beeler, *What It Might Take to Protect the World's Biggest Naval Base from Rising Seas*, WORLD (June 23, 2016), <https://www.pri.org/stories/2016-06-23/what-it-might-take-protect-worlds-biggest-naval-base-rising-seas> [<https://perma.cc/3VAB-8K7T>].

352. See, e.g., Robert L. Fischman, *Letting Go of Stability: Resilience and Environmental Law*, 94 IND. L.J. 689, 693 (2019) (arguing that law reform in the face of the climate crisis "must operate in a flexible, adaptive manner and provide avenues to work across jurisdictional boundaries"); cf. Kirsten Engel, *Climate Federalism in the Time of COVID-19: Can the States "Save" American Climate Policy?*, 47 N. KY. L. REV. 115, 117 (2020) ("While a national climate action regulatory program is clearly more effective than uncoordinated state action, . . . states—working individually or collectively—can at least fill in some of the gaps created by the Trump roll-backs, and create new models for future federal climate legislation."); Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1973 (2007) ("[I]f well-designed, subnational state-level strategies could yield some payoffs.").

to register for assistance before a storm strikes.<sup>353</sup> They should also identify ways to move human services personnel from unaffected areas in their state to impacted areas that need additional support.<sup>354</sup>

Absent federal leadership, states, territories, and Tribes could also create working groups to identify best practices in adapting public benefit programs for the climate crisis. States, territories, and Tribes could engage in interstate and regional compacts that would allow them to send caseworkers and other social services personnel to help other states in need. These kinds of ad hoc arrangements among states occurred following Hurricanes Katrina and Rita.<sup>355</sup> As the climate crisis intensifies, it will become harder for a state, territory, or Tribe to volunteer its own personnel to another jurisdiction, lest it deprive its own agencies of the resources it needs to respond to a climate-fueled disaster within its borders. But compacts among states, territories, and Tribes that tend to experience these extreme weather events at different points in the year could persist well into the next decade.

Finally, states, territories, and Tribes should continue to take advantage of any flexibility in federal law to make these programs more accessible. They should routinely file for federal waivers to improve individual access to these benefits. Specifically, they should seek to waive in-person application requirements for those individuals who cannot be reasonably expected to do so, such as the elderly or people with disabilities, and those in areas where the jurisdiction's own offices are severely damaged.<sup>356</sup> They can also consider asking for longer eligibility windows in case some areas are slow to implement disaster services.<sup>357</sup> As recoveries drag on, receiving jurisdictions will need to figure out ways to streamline applications for these new residents. Differences in eligibility among states, territories, and Tribes will most likely create additional administrative burdens to applicants and bureaucrats alike.

### C. *Toward a New Safety Net for the Climate Crisis*

While some state, territorial, and tribal governments will employ a variety of strategies to meet surges in need, others may seek to deny entry or assistance to new arrivals from other states or the territories. Indeed, as Part III showed with state responses to the pandemic, it appears that some states are willing to forego federal assistance to their own residents.<sup>358</sup> This kind of state governance could have severe implications as it is likely that internal displacement in the United

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353. See *D-SNAP Pre-Registration*, LA. DEP'T OF CHILD. & FAM. SERVS., <http://www.dcf.la.gov/page/dsnap-registration> [https://perma.cc/E6YG-USNN]; Super, *Against Flexibility*, *supra* note 21, at 1452.

354. See ADVOCATE'S GUIDE TO D-SNAP, *supra* note 121, at 20.

355. *Id.* (recounting how several states responded to Louisiana's request for additional personnel).

356. See *supra* notes 232–242 and accompanying text.

357. See *id.*

358. See *supra* notes 302–308 and accompanying text.

States and elsewhere will become an ever-present social phenomenon. Importantly, there is dusty but durable Supreme Court precedent for the proposition that the Constitution prohibits a state from barring poor people from crossing its borders or seeking services.<sup>359</sup> Indeed, precisely because of that possibility, it will be crucial that people seeking assistance have access to attorneys who have the expertise necessary to challenge these practices. Regardless of whether volunteer junior attorneys were the appropriate way to deliver disaster legal services in years past, such an arrangement seems woefully inadequate for the increased demand and legal complexities that will arise during the climate crisis. Yet, even if there are attorneys able to represent poor people and precedent upon which those lawyers can rely, jurisdictions will experiment with various policy and practices that will, in turn, test that precedent anew.

Congress could head off these punitive state practices by equalizing benefit levels across states and shouldering more of the costs. Congress could do so by replacing some of the fiscal federalism of these programs or by funding the services for people newly arrived in the receiving jurisdiction, as suggested above. Yet, these concerns about uneven and unwilling state implementation of assistance are likely to persist. In that way, this Article lends additional support to those who have argued that a new cash-based benefit like a universal basic income (UBI) would avoid these structural pitfalls. And perhaps the ways in which the federal government seemed willing to provide cash assistance in the COVID-19 response suggest a political opening. Furthermore, moving away from state-based aid would also benefit people who are often excluded from that cooperative federalism, including immigrants, people in the territories, and tribal members.

Nonetheless, these climate-fueled disasters teach us that while state-based aid may be structurally deficient, in-kind aid, like food distribution and temporary housing, will still be necessary. If retail food stores are unavailable and people's homes are destroyed, government will need to find ways to feed and house survivors without relying on cash or quasi-cash benefits. As a result, it is unlikely that even a nationalized safety net, whether universal like UBI or created through existing, retrofitted programs like SNAP, will negate the need for in-kind assistance in the coming years.

#### CONCLUSION

All of us must adapt to Earth's rapidly changing climate. We will also judge our government's ability to do so. Considering how the United States has relied on its public benefit programs to respond to fires and floods in the past, it is likely that the United States will continue to use these programs to respond to people displaced and impoverished by climate-fueled disasters. To do that effectively, the United States will need to adapt these programs in ways that make them more

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359. See *supra* Part I.B (discussing cases).

reliable, accessible, and portable. This Article provides a roadmap for such new and strange terrain.